(18)

No. 90-813-CFX
Status: GRANTED

Title: Houston Lawyers' Association, et al., Petitioners
v.
Attorney General of Texas, et al.

Docketed:
November 21, 1990

Court: United States Court of Appeals
for the Fifth Circuit

Vide:
90-974

Counsel for petitioner: Ralston,Charles Stephen, Cunningham,E. Brice, Rios,Rolando L.

See also:
90-757

Counsel for respondent: Garrett,William L., Hicks,Renea, Clements,J. Eugene, Cloutman III,Edward B., Mow Jr.,Robert H.

15 copies of lodging recd. 11/21.

Entry	Date	Note	Proceedings and Orders
1	Nov 21 1990	G	Petition for writ of certiorari filed.
2	Nov 21 1990		Appendix of petitioner filed.
3	Dec 21 1990		Memorandum of respondents Jim Mattox, et al. filed. VIDED.
4	Dec 21 1990		Brief of respondent Judge Sharolyn Wood in opposition filed.
5	Dec 26 1990		Waiver of right of respondent Judge F. Harold Entz to respond filed.
7	Jan 14 1991		REDISTRIBUTED. January 18, 1991
8	Jan 14 1991		REDISTRIBUTED. January 18, 1991
9	Jan 18 1991		Petition GRANTED. The case is consolidated with 90-974, and a total of one hour is allotted for oral argument.
			**********
10	Feb 4 1991		Record filed.
		*	Certified copy of original record, proceedings and exhibites received. (6 Boxes). Vide 90-974.
11	Feb 27 1991		SET FOR ARGUMENT MONDAY, APRIL 22, 1991. (2ND CASE)
12	Mar 4 1991		Joint appendix filed. VIDED.
13	Mar 4 1991		Brief of petitioners Houston Lawyers' Association, et al. filed.
14	Mar 4 1991		Brief amicus curiae of United States filed. VIDED.
15	Mar 4 1991		Brief amici curiae of Lawyers' Committee for Civil Rights Under law, et al. filed. VIDED.
16	Mar 4 1991		Brief amicus curiae of American Judicature Society filed. VIDED.
17	Mar 14 1991	D	Motion of respondent Sharolyn Wood for divided argument filed.
18	Mar 19 1991	D	Motion of respondent F. Harold Entz for divided argument filed.
19	Mar 19 1991		Opposition of Attorney General of Texas to motions for divided argument filed.
20	Mar 22 1991		CIRCULATED.
21	Mar 25 1991		Motion of respondent Sharolyn Wood for divided argument DENIED.
22	Mar 25 1991		Motion of respondent F. Harold Entz for divided argument DENIED.
23	Apr 2 1991	X	Brief amicus curiae of Georgia filed. VIDED.
24	Apr 3 1991	G	Motion of Florida Conference of Circuit Judges, et al. for leave to file a brief as amici curiae filed.

No. 90-813-CFX

Entry	Date	Note	Proceedings and Orders
25	Apr 3 1991	X	Brief of respondent Judge F. Harold Entz filed. VIDED.
26	Apr 3 1991	X	Brief of respondent Judge Sharolyn Wood filed.
29	Apr 3 1991	G	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae in No. 90-974 filed.
27	Apr 8 1991	X	Brief amici curiae of Tennessee, et al. filed.
28	Apr 8 1991	X	Brief of respondents Jim Mattox, et al. filed. VIDED.
30	Apr 15 1991		Motion of Florida Conference of Circuit Judges, et al. for leave to file a brief as amici curiae GRANTED.
31	Apr 15 1991		Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae in No. 90-974 GRANTED.
32	Apr 15 1991	X	Brief Supplemental Joint Appendix filed. VIDED.
33	Apr 15 1991	X	Reply brief of petitioners Houston Lawyers' Association, et al. filed. VIDED.
34	Apr 22 1991		ARGUED.

(1)

90-813

Supreme Court, U.S.
FILED
NOV 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve a conflict between the circuits as to whether Section 2 of the Voting Rights Act, as amended, governs the election of judicial officers?

2. Does Section 2 apply to the election of all judicial officers, including trial judges?

PARTIES

The participants in the proceedings below were:

League of United Latin American Citizens (LULAC) Local Council 4434, LULAC Local Council 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr. Jom Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Mary Ellen Hicks, Rev. James Thomas, *Plaintiffs;*

The Houston Lawyers' Association, Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, Francis Williams, *Plaintiff-Intervenors;*

Jesse Oliver, Fred Tinsley and Joan Winn White, *Plaintiff-Intervenors;*

Jim Mattox, in his capacity as Attorney General of the

State of Texas; George Bayoud, Secretary of State of Texas; Thomas R. Phillips, Mike McCormick, Ron Chapman, Thomas J. Stovall, James F. Clawson, John Cornyn, Robert Blackmon, Sam B. Paxson, Weldon Kirk, Jeff Ealker, Ray D. Anderson, Joe Spurlock II, and Leonard E. Davis, in their capacity as members of the Texas Judicial Districts Board; *Defendants;*

Judge Sharolyn Wood and Judge Harold Entz, *Defendant-Intervenors.*

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No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Houston Lawyers' Association, Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, and Francis Williams respectfully pray that a writ of certiorari issue to review the judgement and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding September 28, 1990.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 914 F.2d 620 as *LULAC v. Clements*, and is set out at pp. 1a-182a of the appendix hereto ("App,"). The opinion of the United States District Court for the Western District of Texas is not reported at and is set out at pp. 183a-304a of the appendix, except for statistical tables that are an appendix to the district court's opinion. Copies of those tables have been filed under separate cover with the Clerk of the Court.

In addition to the opinions in this case, a letter from Assistant Attorney General John Dunne, dated November 5, 1990 interposing an objection to fifteen additional district judgeships in Texas is set out at pp. 304a-308a of the appendix hereto.

JURISDICTION

The decision of the Fifth Circuit was entered on

September 28, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTE INVOLVED

This case involves Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, which provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by a State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the politcal process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision in one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class

elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

The Proceedings Below

This case was filed in the Western District of Texas on July 11, 1988[1] on behalf of Mexican American and African American voters challenging the at-large election of district

[1]In October 1988, the district court for the Western District of Texas stayed all proceedings in this case pending this Court's decision on a writ of certiorari filed in *Chisom v. Roemer. Docket No. 88-327.* In that case, in which African American voters challenged the multi-member configuration of the First Supreme Court District in Louisiana, a panel of the Fifth Circuit held that judicial elections are covered by Section 2 of the Voting Rights Act. 839 F.2d 1056 (5th Cir. 1988) This Court denied certiorari on November 14, 1988. 488 U.S. __, 102 L.Ed.2d 379 (1988). After a trial on the merits, the district court in *Chisom* held that the plaintiffs had not established that the method of electing supreme court justices in Louisiana violated either the Voting Rights Act or the Constitution. The *Chisom* plaintiffs appealed their claim under the Voting Rights Act to the Fifth Circuit.

On November 2, 1990, the Fifth Circuit issued an order in *Chisom*, remanding the case to the district court for dismissal of the complaint in light of the court's decision in *LULAC*. African American plaintiffs in *Chisom* filed a petition for a writ of certiorari to this Court on November 14, 1990.

judges in 11 counties in Texas.[2]

On February 28, 1989, the district court granted the intervention of the Houston Lawyers' Association (HLA) and five African American voters from Harris County, Texas (hereafter referred to as "petitioners"), as well as the intervention of four African American voters from Dallas County, Texas. The petitioners challenged the at-large, winner-take-all, majority vote, numbered post requirement for electing district judges, on the grounds that this winner-take-all method of electing judges denies African American voters an equal opportunity to elect candidates of their choice and to participate in the political process in violation of §2 of the Voting Rights Act of 1965, as amended. Petitioners also alleged that the winner-take-all at-large election requirement for district judges was adopted and

[2]Originally, plaintiffs challenged the at-large method of electing district judges in 44 counties in Texas. Plaintiffs later withdrew their claim against the electoral system in 33 counties.

maintained for the purpose of diluting African American voting strength in violation of §2 and the Fourteenth and Fifteenth Amendments to the Constitution.[3] The petitioners showed that under a single-member district electoral scheme, or a modified at-large electoral system which removed the winner-take-all feature of the current electoral scheme, African American voters would be able to elect their preferred candidates as district judges. *See*, Complaint in Intervention of Houston Lawyers' Association, *et. al*, at paragraph 42.

A trial on the merits in *LULAC* was held in September 1989. The district court found that the current method of electing district judges in every county challenged in the lawsuit, violates §2 of the Voting Rights Act in that it denies Mexican American and African American voters an equal opportunity to elect their candidates of choice to the district

[3]Plaintiffs did not appeal the district court's rejection of their claim of intentional discrimination.

court bench. The district court made specific findings following the guidelines set out by this Court in *Thornburg v. Gingles* 478 U.S. 30 (1986), for analyzing a claim of racial vote dilution under the §2 "results" test. The district court also found that the "typical factors" enumerated in the Senate Report[4] accompanying the 1982 amendments to the Voting Rights Act, which tend to demonstrate that an electoral scheme dilutes the voting strength of minority voters, pointed overwhelmingly to the existence of vote dilution in Texas' district judge election system.[5]

On January 2, 1990, the district court entered an order setting out an interim remedy for the 1990 election of judges only, incorporating some elements of a settlement agreement entered into by the petitioners and the State defendants. The

[4]Senate Report No. 97-417, 97th Cong., 2nd Sess. (1982)

[5]This Court has recognized the Senate Report as the "authoritative source for legislative intent" in interpreting amended Section 2. *Gingles*, 478 U.S. at 43, n.7.

Fifth Circuit stayed the district court's interim order in *LULAC* on January 11, 1990, upon motion of the defendant-intervenor incumbent judges. An interlocutory appeal was filed by defendant-intervenors on January 4th and granted by the Fifth Circuit on January 11, 1990.

Oral argument was heard before a panel of the Fifth Circuit in both *LULAC* and *Chisom* on April 30, 1990. Eleven days after oral argument, the panel reversed the district court opinion in *LULAC* on the ground that the election of trial judges is not covered by Section 2.

Sua sponte, the Fifth Circuit ordered rehearing *in banc* in *LULAC*. Oral argument was heard on June 19, 1990. On September 28, 1990, the Fifth Circuit, without reference to the merits of the case, reversed the district court's ruling in *LULAC* by a 12-1 majority. By a 7-6 majority, the Fifth Circuit also overruled its prior decision in *Chisom v. Edwards* and held that the "results" test for vote dilution in

amended §2 of the Voting Rights Act does not apply to the election of judges, "for the cardinal reason that judges need not be elected at all." *LULAC v. Clements*, 914 F.2d 620, (5th Cir. 1990). Five judges, in an opinion authored by J. Higginbotham, adhered to the position taken by the panel that while appellate judges are covered by Section 2, trial judges are not. J. Johnson, the author of the original panel opinion in *Chisom*, dissented.

Statement of Facts

The State of Texas elects 375 districts judges from districts which, in accordance with the Texas Constitution as amended in 1985, may be no smaller than an entire county. *See* Texas Constitution of 1876, as amended, Art. 5 §7 (a)(i). In addition to the countywide election requirement, district judges must run for numbered posts and a candidate must receive a majority of the vote cast to win the primary

and general election. Although Texas' district judges sit in the counties from which they are elected, district judges have statewide jurisdiction in trial courts of general jurisdiction. Every county in which plaintiffs challenged the at-large electoral system elects more than one district judge.

Harris County is the largest county in the state of Texas both by geographic size and by population.[6] Harris County is also served by the largest number of district judges in the state -- 59. Although the African American population of the County is nearly 20%, and the African American voting age population is 18%, only three of Harris County's 59 district judges at the time of trial, or 5.1%, were African American. It was undisputed that this was the largest number of African Americans to ever serve as district judge at the same time in Harris County. Trial Transcript, Vol. 3 at p.207. The district court further found that although 17

[6]According to the 1980 Census, the population of Harris County is nearly 2.5 million.

African American candidates have run for district judge in Harris County since 1980, only 2 won. App. at 279a.

Petitioners demonstrated that voting is extremely racially polarized in Harris County. In 17 contested elections involving African American and white candidates, white voters never gave more than 40% of the their vote to African American candidates. *See* Supplemental Appendix at p.1. African American voters however, persistently gave more than 96% of their vote to African American candidates. App. at 215a. Race also consistently outweighed party affiliation in district judge elections in Harris County. In 1986 for example, every white Democratic incumbent district judge was reelected to office. Every African American Democratic incumbent district judge lost the same election. Trial Transcript at Vol. 3, p.139. The district court found, and the overwhelming evidence introduced at trial proved, that race continues to effect the

outcome of district judge elections in the 11 counties involved in the suit. App at 217a. The district court also found that it would be possible to afford minority voters an equal opportunity to elect their candidates of choice to the district court bench through the adoption of an alternative electoral scheme. *See, e.g.,* Interim Order of District Court, January 2, 1990. Petitioners were prepared to present, at a remedial hearing, several potential alternative election schemes to "completely remed[y] the prior dilution of minority voting strength and fully provid[e] equal opportunity for minority citizens to participate and to elect candidates of their choice." Senate Report No. 97-417, 97th Cong., 2nd Sess., at p.31 (1982) [hereafter "S.Rep."]. Two of these alternative remedies, cumulative and limited voting, modify the at-large electoral structure by removing the "winner-take-all" feature and lowering the "threshold of exclusion" for minority voters. It was alleged by the

petitioners that either cumulative or limited voting would cure the proven violation and give African American voters in Harris County an equal opportunity to elect district judges.

Petitioners' alternative electoral schemes, alleged in their complaint, were not yet considered by the district court, who entered an interim remedial order without holding a remedial hearing.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S PER SE RULE THAT AT-LARGE JUDICIAL ELECTIONS CANNOT BE CHALLENGED UNDER SECTION 2 OF THE VOTING RIGHTS ACT SQUARELY CONFLICTS WITH THE ONLY OTHER COURT OF APPEALS TO DECIDE THIS ISSUE

This case raises the same issue raised by *Chisom v. Roemer*, for *writ of certiorari*: whether Section 2 of the Voting Rights Act governs judicial elections. However, this case raises a further important issue not present in *Chisom* -- whether Section 2 governs the election of trial court judges as well as appellate court judges. Therefore, *certiorari* should be granted in both cases.

A. The Question Whether Section 2 Governs the Election of Judges Is One of National Importance

The Fifth Circuit's interpretation of the scope of §2 in *LULAC* has far reaching implications for voters throughout the country. As was noted by the petitioners in *Chisom*, cases challenging the election of judges under Section 2 of the Voting Rights Act have been brought in Ohio, Louisiana, Texas, Florida, Alabama, Georgia, Arkansas, Illinois, Mississippi and North Carolina.[7]

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[7] *See Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988) (challenge to the countywide election of municipal judges in Cincinnatti, Ohio); *Chisom v. Roemer, supra; Clark v. Edwards*, 725 F.Supp. 285 (M.D. La. 1988) (challenge to at-large election of family court, district court, and court of appeals judges in Louisiana); *Nipper v. Martinez*, No. 90-447-Civ-J-16 (M.D. Fla. 1990) (challenge to the at-large election of trial judges in the Fourth Judicial Circuit in Florida); *SCLC v. Siegelman*, 714 F.Supp. 511 (M.D. Ala. 1989) (challenge to the numbered post, at-large method of electing circuit and district court judges in Alabama); *Brooks v. State Bd. of Elections*, Civ. No. 288-146 (S.D.Ga. 1989) (challenge to at-large method of electing superior court judges in Georgia under §§2 and 5 of Voting Rights Act); *Hunt v. Arkansas*, No. PB-C--89-406 (E.D. Ark. 1989) (challenge to the at-large method of electing circuit, chancery, and juvenile court judges in Arkansas); *Williams v. State Bd. of Elections*, 696 F.Supp. 1563 (N.D. Ill. 1988) (challenge to the at-large method of electing Supreme Court, Appelllate and Circuit

The Fifth Circuit's decision in *LULAC* has already begun to affect the rights of voters in those cases. In three of the cases, *SCLC v. Siegelman, supra, Nipper v. Martinez, supra, Hunt v. Arkansas, supra,* the respective district judges have ordered briefing from the parties on defendants' motions for reconsideration and motions to dismiss. Considerable prejudice to the rights of both voters and candidates in those jurisdictions could result should this Court fail to review *LULAC*.

Moreover, the confusion created by the Fifth Circuit's decision that Section 2 and Section 5 of the Act do not operate in tandem for the election of judges in and of itself compels review by this Court. Section 5 and Section 2 have traditionally been interpreted to have concurrent application.

Court judges from Cook County, Illinois); *Martin v. Allain*, 658 F.Supp. 1183 (S.D. Miss. 1987) (challenge to the at-large election of judges to state chancery and circuit courts in three counties in Mississippi); *Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C.) (challenge to the statewide election of state superior court judges in North Carolina).

This Court recently affirmed that Section 5 of the Voting Rights Act covers the election of judges, *Brooks v. State Bd. of Elections* 59 U.S.L.W. 3293 (October 15, 1990), and reaffirmed its decision in *Haith v. Martin*, that "the Act applies to all *voting* without any limitation as to who, or what is the object of the vote." 618 F.Supp. 410, 413 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) (emphasis in original). The traditional view that both Section 2 and Section 5 apply to "all voting" is based on Sections 2 and 5's shared definitional section in the Act,[8] and follows Congress' specific direction that,

> under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e, litigation or preclearance. The lawfulness of such a practice should not vary depending upon when it was adopted, i.e.. whether it is a change.

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[8]Indeed "Section 5 uses language nearly identical to that of Section 2 in defining prohibited practices -- 'any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.'" *Mallory v. Eyrich*, 839 F.2d 275, 280 (6th Cir. 1988).

House Report No. 97-227, 9th Cong., 1st Sess., at p.28 (1982) [hereafter "House Rep."].

However, under the *LULAC* majority's analysis,

> if a jurisdiction has a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if a state sought to introduce that very procedure as a change from existing procedures, it would be subject to Section 5 preclearance and could not be implemented.

Higginbotham concurring, App. at 87a-88a . Such a conflicting and contradictory application of the Act will prejudice the rights of voters in jurisdictions with existing discriminatory judicial election schemes.

This point is powerfully illustrated by the Justice Department's recent objection, under the preclearance provisions of Section 5, to fifteen additional district judgeships in Texas. On Monday November 5, 1990, the Justice Department interposed an objection in Tarrant, Dallas, and Lubbock Counties to the additional district

judgeships on the grounds that "the at-large method of election [of these district judgeships] even considered in isolation from the numbered post and majority-vote features, produces a discriminatory result proscribed by Section 2." *See* Letter of Assistant Attorney General John Dunne, App at 312a. The Attorney General also noted that,

> [t]he *LULAC* court. . . expressly recognized that 'Section 5 of the Act applies to state judicial elections' and *until this matter is further clarified by the courts we seen no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2.*

Id.(citation omitted)(emphasis added).

It was the same at-large method of electing district judges in each of these three counties that was at issue in LULAC. This is exactly the "incongruous result" anticipated by Judge Higginbotham in his concurrence in LULAC.

This Court should review this critical issue.

B. *The Fifth Circuit's Decision in LULAC Squarely Conflicts with the View of the Only Other Circuit to Decide the Issue of Section 2's Applicability to the Election of Judges*

In reaching its conclusion in *Chisom I*, that judicial elections must be covered by Section 2, the Fifth Circuit relied substantially upon the same reasoning as did the Sixth Circuit in *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988). The Fifth Circuit in *LULAC* now overrules *Chisom I*, for reasons which directly conflict with the Sixth Circuit's analysis in *Mallory*.

In *Mallory*, the Sixth Circuit held that §2 of the Voting Rights Act covers the election of municipal trial judges in Hamilton County, Ohio. Based on its analysis of the statute, legislative history and judicial interpretation of the Act, the Sixth Circuit concluded, in particular, that there is "no basis in the language or legislative history of the 1982 amendment [to the Act] to support a holding that [the] use of the word

'representatives' was intended to remove judicial elections from the operation of the Act." 839 F.2d at 280.

This holding squarely conflicts with the Fifth Circuit's conclusion in *LULAC* that Congress *specifically* intended by using the word "representatives" to exclude the election of judges from coverage under Section 2, and sought instead to "leave [the election of judges] to be regulated and controlled by state law, by the Constitution, or by other provisions of the Voting Rights Act." App. at 25a.

Moreover, *Mallory* involved trial court judges. Therefore, its holding that Section 2 governs judicial elections squarely conflicts with the holding of the *LULAC* panel and 5 members of the *in banc* court that Section 2 governs only the election of appellate court judges. This conflict between the Fifth and Sixth Circuit's interpretation of Section 2's applicability to the election of judges should be resolved by this Court.

II. THIS COURT SHOULD REVIEW *LULAC* IN ORDER TO RESOLVE COMPLETELY THE QUESTION OF SECTION 2'S APPLICABILITY TO THE ELECTION OF JUDGES

Review should be granted in this case and it should be heard at the same time as *Chisom v. Roemer*. Unlike *Chisom*, this case raises the additional question whether a Section 2 vote dilution analysis can apply to the election of trial judges. Review of this question is critical to determine the broad issue of Section 2's applicability to the election of judges. Moreover, this question is at the heart of the *LULAC* petitioners' claims.

Judge Higginbotham's concurrence in *LULAC*, joined by four other members of the Fifth Circuit, offers an alternative interpretation of the scope of the Voting Rights Act that draws a distinction between the application of Section 2 to the election of trial and appellate judges.

Concluding that Section 2 applies to the election of judges in general, Judge Higginbotham contends that because subdistricting for purposes of electing district judges, unlike other offices, would change the structure of the government, change the nature of the decision making body, and would diminish the appearance if not fact of judicial independence, the election of trial judges cannot be challenged under Section 2's results test. *See*, Higginbotham concurrence at 91a-112a.

By contrast, according to Judge Higginbotham, the election of appellate judges to "multi-member decisionmaking bodies," lends itself naturally to a single-member district remedy, and as such, can be challenged under Section 2. *Id*. Following Judge Higginbotham's reasoning, petitioners in *Chisom*, who challenged the election method for the Louisiana Supreme Court, could prevail in their vote dilution claim for appellate judges, but *LULAC*

petitioners would be precluded from bringing a similar claim against the election of trial judges.

This interpretation of Section 2 renders irrelevant the factual findings of vote dilution made by a district court, and unjustifiably relies on reservations about the propriety of one hypothetical remedial strategy as the sole basis for restricting of the scope of the Voting Rights Act. Judge Higginbotham's analysis is perhaps most disturbing in that it bases the Act's entire substantive coverage on the court's perception of the adequacy of one possible fact-specific remedy, which the parties never developed or presented at a full remedial hearing.

In *LULAC*, where the petitioners alleged *inter alia* that an alternative modified at-large remedy could cure the proven violation and where no remedial hearing was held, Judge Higginbotham's interpretation of the Act is particularly ironic. In effect, although Judge Higginbotham

holds out the promise of applying the Voting Rights Act to minority voters challenging judicial elections, he denies relief to minority voters when vote dilution is proven.

Indeed, failure to review Judge Higginbotham's interpretation of the Act may irreparably impair the rights of minority voters in Texas. Should this Court grant review of *Chisom*, which involves a challenge to the election of appellate judges, and ultimately rule in favor of the *Chisom* petitioners, *LULAC* petitioners would be remanded to a panel of the Fifth Circuit predisposed to dismiss their claim, this time on grounds potentially not addressed by the Court in *Chisom*. The *LULAC* petitioners would then seek review by this Court next year on the same issue. Pursuing this time-consuming and pointless course on remand could effectively preclude the *LULAC* petitioners from obtaining relief in time for the qualifying period of the 1992 judicial elections. Such a result would be needlessly prejudicial to

the *LULAC* petitioners. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Therefore, this court should grant review of both *Chisom* and *LULAC*.

The question of Section 2's application to the election of trial judges is also of particular and independent significance from the broad question raised by *Chisom*. Judge Higginbotham's likening of the 59 district judges elected from Harris County to individual governors or mayors elected to single offices, is at odds with this Court's view of trial judges. Other courts, including the district court summarily affirmed by this Court in *Haith*, have regarded trial judges elected to numbered posts within a jurisdiction as "designated seats in multi-member districts." 618 F.Supp. at 414. *See also SCLC v. Siegelman*, 714 F.Supp at 517-518. As noted above, the Sixth Circuit also adhered to this view of trial judges in *Mallory*.

Judge Higginbotham's view of trial judges may affect the outcome of nearly every case challenging the election of judges under the Voting Rights Act, since in eight of the states where the election of judges has been challenged under Section 2, minority voters have challenged the election of trial judges. In the three cases in which district courts in the Eleventh and Eighth Circuits, respectively, have ordered briefing on the issue of Section 2's application to the election of judges in light of *LULAC*, the judicial offices at issue are trial judges, whose function and jurisdiction is nearly identical to the district judges at issue in Texas. *See Nipper v. Martinez* (trial judges in Fourth Judicial Circuit of Florida); *SCLC v. Siegelman* (circuit and district court judges in Alabama); *Hunt v. Arkansas* (circuit, chancery, and juvenile court judges in certain counties in Arkansas). The question of Section 2's application to trial judges is directly relevant to these three pending cases.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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90-813

No. 90-

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8014

LEAGUE OF UNITED LATIN AMERICAN CITIZENS COUNCIL NO. 4434,
Plaintiffs-Appellees,

and
JESSE OLIVER, ET AL.,
Intervening
Plaintiffs-Appellees,
versus
WILLIAM P. CLEMENTS, ETC., ET AL.,
Defendants,
JIM MATTOX, ET AL.,
Defendants-Appellees,
Appellants,
versus
JUDGE F. HAROLD ENTZ, ETC.,
JUDGE SHAROLYN WOOD, ETC.
and GEORGE S. BAYOUD, JR., ETC.,
Defendants-Appellants,
and
TOM RICKHOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE and MICHAEL P. PEDAN, Bexar County, Texas State District Judges,
Appellants.

Appeal From the United States District Court
for the Western District of Texas

(September 28, 1990)

Before , Chief Judge,
GEE, POLITZ, KING, JOHNSON, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, AND BARKSDALE, Circuit Judges.* GEE, Circuit Judge:

Today we must decide whether Congress, by amending Section 2 of the Voting Rights Act in 1982 to add a "results" test for dilution of minority voting strength, meant to subject the selection of state judges to the same test as that for representative political offices by incorporating language from the Supreme Court decision in White v. Regester.[1] For reasons to be given -- and for the cardinal reason that judges

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*Judges Williams and Garwood took no part in the Court's deliberations or decision of this appeal. When this case was orally argued before and considered by the court, Judge Reavley was in regular active service. He participated in both the oral argument and the en banc conference.

In *United States v. American-Foreign Steamship Co.*, 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960), the Supreme Court, interpreting 28 U.S.C. § 371(b), decided which senior judges are eligible to participate in an en banc court. Compare United States v. Cocke, 399 F.2d 433, 435 n.4 (5th Cir. 1968) (en banc). As Judge Reavley reads the *American-Foreign Steamship Co.* opinion, he considers himself ineligible now to participate in the decision of this case, and he has not therefore done so.

[1] 412 U.S. 755 (1973).

need not be elected at all -- we conclude that it did not.

In summary, these are that Congress was at great pains to phrase the new Section 2 in such language as to make clear that its results test applies to voting in elections of *representatives* only; that as of the amendment's time judicial offices had never been viewed by any court as representative ones; that characterizing the functions of the judicial office as representative ones is factually false -- public opinion being irrelevant to the judge's role, and the judge's task being, as often as not, to disregard or even to defy that opinion, rather than to represent or carry it out; that, because of the highly intrusive nature of federal regulation of the means by which states select their own officials, legislation doing so should not be pushed beyond its clear language; and that, in view of these considerations, we should place such a construction on the 1982 enactment reluctantly and only if Congress has clearly mandated such a singlar result.

We have carefully weighed the text and provenance of the statutory language against the opposing factors urged upon us as interpretive guides. Having done so, we conclude that the language of the 1982 amendment is clear and that it extends the Congressional non-Constitutional "results" test for vote dilution claims no further than the legislative and executive branches, leaving the underlying, Constitutional "intent" test in place as to all three. Especially telling, we conclude, is the circumstance that in borrowing language from the Court's *White* opinion Congress focused upon its reference to electing "legislators," broadening it so far, but only so far, as to electing "representatives," a term inclusive of elective members of the executive branch as well as of the legislature but not -- as, say, "state officials" would have been -- of members of the judiciary. That Congress did exactly as we have described is as undeniable as it is inexplicable on any basis other than that of a legislative purpose to include all elected

legislative and executive state officials but to exclude elected judges.

Finally, and bearing in mind the well-settled principle of statutory construction that the enacting Legislator is presumed to have been aware of the judicial construction of existing law,[2] we note that, as of the time of the addition of Section 2(b) and of the explicit results test to the Voting Rights Act, every federal court which had considered the question had concluded that state judges were not "representatives" and did not fall within the definition of that term. Had Congress, then, meant to exclude votes in judicial elections from the ambit of its new results test, it could scarcely have done so more plainly than by adopting the term "representative" to describe that ambit.

Facts and Procedural History

The underlying facts of this appeal are carefully and

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[2] *See, e.g., Shapiro v. United States*, 335 U.S. 1, 16 (1948); United States v. PATCO, 653 F.2d 1134, 1138 (7th Cir.), cert. denied, 454 U.S. 1083 (1981).

correctly set out in the panel opinion, 902 F.2d 293 (5th Cir. 1990); we recapitulate them here no further than is necessary to an understanding of what we write today.

Plaintiffs attacked the Texas laws providing for countywide, at-large election of judges of the trial court of general jurisdiction, asserting that the imposition of a single-member system was necessary to prevent dilution of black and Hispanic voting strength. In a bench trial, the federal court rejected their constitutional arguments grounded in the Fourteenth and Fifteenth Amendments, finding a failure to prove the requisite discriminatory intent for relief under those provisions. The court determined, however, that the Texas law produced an *unintended* dilution of minority voting strength, a circumstance sufficient to call for relief under the Voting Rights Act, as amended in 1982 to incorporate a "results" test dispensing with the necessity of proof of discriminatory intent. In consequence, and after pausing to allow for possible remedial action by the state,

the court enjoined further use of the at-large system, confected and imposed a system of single-member elections, and directed that these be held last Spring.

On appeal, we stayed the court's order, expedited the appeal, held a panel hearing on April 30, and handed down an opinion on May 11. Four days later, pursuant to a majority vote of active judges, we ordered rehearing of the appeal en banc; and we now render our opinion.

Analysis

The Panel Opinion

At the time of its decision, our panel was constrained by an earlier decision of the Circuit holding that Section 2 of the Act applied to elections held to fill positions on the Louisiana Supreme Court, a seven-member body.[3] Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988). Constraint was superfluous, however; for the panel embraced and agreed with the holding and reasoning of *Chisom* applying the Act

[3] It is the settled law of our Circuit that one panel of the Court does not overrule another. *Ryals v. Estelle*, 661 F.2d 904 (5th Cir. 1981).

to judicial elections. It went on, however, to conclude that although in its view judges were indeed "representatives of the people," and although as their representatives the judges' elections were controlled by Section 2(b) of the Act, the elections of *trial* judges were not subject to voter-strength dilution concerns because their offices are single-member ones; and there is no such thing as a "share" of a single-member office. *LULAC v. Clements*, 902 F.2d 293, 305 (5th Cir. 1990). *See* Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) (offices of mayor, council president, comptroller are single-member ones) and United States v. Dallas County, Ala., 850 F.2d 1433 (11th Cir. 1988) (county probate judge). A vigorous dissent by Judge Johnson, author of the panel opinion in *Chisom*, disputed the panel majority's characterization of judges from multi-judge districts as holders of single-member offices. We need not resolve this disagreement within the panel, however, as we do not reach

the issue.

Statutory Background

Originally enacted in 1965 as an anti-test, anti-device provision to relieve blacks of state-law strictures imposed upon their Fifteenth Amendment voting rights, Section 2 of the Voting Rights Act was construed by the Supreme Court in Mobile v. Bolden, 446 U.S. 55 (1980), as adding nothing to the Fourteenth and Fifteenth Amendment claims there made and as requiring, for its enforcement, proof of racially-discriminatory intent. At the time of *Bolden*, Section 2 read:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Congress reacted to *Bolden* by amending Section 2 to add to the statute a limited "results" test, to be applied and administered "as provided in subsection (b) of this section." As amended, Section 2 was cast in two subsections:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Earlier, in the course of deciding *White*, a 1973 voting rights case invoking constitutional grounds, the Court had described the required standard of proof in felicitous terms:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- *that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.*

412 U.S. at 766 (emphasis added). Casting about for appropriate language in which to couch its new subsection, and having inserted the reference to results in old Section 2, Congress settled upon the italicized portion of Justice White's opinion quoted above, adopting it with only one significant alteration.

New subsection (b), then, is patterned on the *White* court's language and provides with great specificity how violations of the newly incorporated results test must be established: a violation is shown on a demonstration, by the totality of the circumstances, that state (or political subdivision) nomination and election processes for representatives of the people's choice are not as open to minority voters as to others. The precise language of the

section is significant; a violation is shown, it declares, if it is established that members of the protected classes

> have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[4]

Both the broad and general opportunity to participate in the political process and the specific one to elect representatives are thus treated in the new section.[5] As for the former, protecting it appears to involve all of the primal anti-test, anti-device concerns and prohibitions of original Section 2; and its provisions may well extend to all elections whatever, as did they.[6] These broader considerations center

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[4] As we note in text, the section goes on to specify that election success of class members is a circumstance to be considered and to disavow specifically any intent to mandate proportionate representation by race.

[5] Not all aspects of that process pertain to elections, *e.g.*, the celebrated New England town meeting.

[6] That scope is not at issue today, the trial court having found an absence of discriminatory intent; and we do not decide it. We point out, however, that there can be no doubt whatever that the provisions of the Fourteenth and Fifteenth Amendments, enforceable by means of Section 1983 actions, apply to judicial elections to forbid intentional discrimination in any aspect of them. *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980).

on the voter and on his freedom to engage fully and freely in the political process, untrammeled by such devices as literacy tests and poll-taxes. Where judges are selected by means of the ballot, these safeguards may apply as in any other election, a matter not presented for decision today. The second consideration -- opportunity to elect representatives of one's choice -- is also couched in the language borrowed from White v. Regester, 412 U.S. 755, 766 (1973); and, as we have noted, the Congress was at some pains to adapt and broaden the Court's phrases so as to convey its precise meaning. Before pursuing this aspect of our inquiry further, however, we turn aside to consider briefly the nature of the judicial office and two other closely related topics: judicial selection and the state of authority on judges' status as representatives.

The Judicial Office

Senators and members of the House of Representatives hold clearly political offices. Today, both are directly elected by the people; and it is their function as representatives to synthesize the opinions of their constituents and reflect them in the debate and deliberation of public issues.[7] The executive branch of the government, headed by our highest officer elected at large in the nation, is also expected to bring the views and opinions which he offered

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[7] James Madison, discussing the unquire relationship of the representative to his constitutents, for example, referred to a relationship of "intimate sympathy" between the elected and his electors, and argued that a legislator should fee an "immediate dependence" upon the will of his constituents. Frequent elections, according to Madison, are the only way to ensure this sort of relationship. Only by requiring legislators to return periodically to their constituents to seek their ongoing support and input, can the communication between the voters and their representatives that is essential to the maintenance of democratic government take place. Congress is a "popular" institution; it is, therefore inherently political.

Hickok, Judicial Selection: *The Political Roots of Advice and Consent* in Judicial Selection: Merit, Ideology, and Politics 4 (National Legal Center for the Public Interest 1990).

the electorate in seeking the Presidency to bear on the job of running the federal machinery.

By contrast, the judiciary serves no representative function whatever: the judge represents no one.[8] As Professor Eugene Hickok has recently observed, in terms upon which we cannot improve:

> The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive. The purpose of the judiciary is not to reflect public opinion in its deliberations or to satisfy public opinion with its decisions. Rather, it is to ensure that the ordinary laws do not run contrary to the more fundamental law of the Constitution, to resolve disputes and controversies surrounding the law, and to resolve disputes among contesting parties over the meaning of the law and the Constitution. If a member of congress serves to

---

[8] That this is the case is strongly implied in the Constitution, which provides for an appointive federal judiciary and was adopted by thirteen states, none of which had an elective one. Yet the Framers believed they were confecting a federal republic, and Article 4, Section 4, of the Constitution guarantees "to every State in this Union a Republican Form of Government. . . ." But if judges hold representative offices, or represent any constituency, appointing them is scarcely consistent with a republican system, defined by the Third Edition of Webster's Unabridged as "[A] government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives . . . ."

> make the law and a president to enforce it, the judge serves to understand it and interpret it. In this process, it is quite possible for a judge to render a decision which is directly at odds with the majority sentiment of the citizens at any particular time. A judge might find, for example, a very popular law to be unconstitutional. Indeed, it can be argued that the quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour.

Hickok, *op. cit. supra* n.7, at 5.

Thus the scholar, and with one voice the case authority of the time agreed. In 1982, as of the time of Congress's adoption of the Court's language from *White*, at least fifteen published opinions by federal courts -- opinions which we list in the margin -- had held or observed that the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections.[9] Not one had held the contrary.

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[9] *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880 (W.D. Pa. 1982), *appeal dismissed*, 714 F.2d 124 (3rd Cir. 1983)

(cross filing permitted by candidates for judicial office, prohibited for legislative and executive candidates)

Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy Dist., 473 F. Supp. 334 (S.D. Ohio 1977)

The Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. D.C. 1975), *cert. denied*, 424 U.S. 933, 47 L.Ed.2d 341 (1976)

Fahey v. Darigan, 405 F. Supp. 1386 (D.C.R. I. 1975)

Gilday v. Board of Elections of Hamilton County, Ohio, 472 F.2d 214 (6th Cir. 1972)

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095, 34 L.Ed.2d 679 (1973)

Buchanan v. Gilligan, 349 F. Supp. 569 (N.D. Ohio 1972)

Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd mem.*, 409 U.S. 807, 34 L.Ed.2d 68 (1972)

Sullivan v. Alabama State Bar, 295 F. Supp. 1216 (M.D. Ala.), *aff'd per curiam*, 394 U.S. 812, 22 L.Ed.2d 749 (1969) (involving Board of Commissioners of Alabama State Bar)

Irish v. Democratic-Farmer-Labor Party of Minnesota, 287 F. Supp. 794 (D.C. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968)

Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3, 17 L.Ed.2d 3 (1966), and *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839, 21 L.Ed.2d 110 (1968)

N.Y. State Assn. of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967)

Kail v. Rockefeller, 275 F. Supp. 937 (E.D.N.Y. 1967)

Romiti v. Kerner, 256 F. Supp. 35 (N.D. Ill. 1966)

Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964)

Typical of these is the opinion in Wells v. Edwards, a decision by a three-judge district court from our own circuit which was affirmed on appeal by the Supreme Court.[10] There, after reviewing various authorities, the district court expressed the entire rationale of its view as follows:

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."

347 F. Supp., at 455-56 (quoting from Buchanan v. Rhodes,

Since 1982 a few courts have held that the use of the term "representatives" in Section 2 does not necessarily exclude judges. *See Southern Christian Leadership Conference of Alabama v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989); *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987). (All recognizing that the "one-man, one-vote" principle does not apply to judicial elections and that, unlike legislators, judges do not "represent" those who elect them, but, nevertheless, refusing to apply its established meaning to Congress' use of the term "representatives" in Section 2 of the Voting Rights Act).

[10] 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095 (1973) (Justice White, joined by Justices Douglas and Marshall, dissenting).

249 F. Supp. 860 and *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148). It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells*, did not concur in that reasoning. If there were doubt, however, it would be laid to rest by the terms of the dissent, which attacks the district court opinion in stern, egalitarian terms for having, like other opinions cited by it, held "that the one-person, one-vote principle does not apply to the judiciary." 409 U.S. 1095, 1096 n.2. Nor is it likely, we think, that the Supreme Court would hold, as it necessarily did in affirming *Wells v. Edwards*, that although for purposes of the Equal Protection Clause of the Fourteenth Amendment judges "do not represent people," all the same, for purposes of Section 2(b) of the Voting Rights Act, judges are "representatives of [the people's] choice."

Both must be true, or neither one.[11]

Wells is not only instructive as to the meaning of "representatives" and thus as to the scope of Section 2, it is dispositive of the precise issue of the scope of Section 2's applicability raised in this case. The *Wells* holding -- that the one-person, one-vote rule does not apply to the judiciary -- leads inexorably to the conclusion that judicial elections cannot be attacked along lines that their processes result in unintentional dilution of the voting strength of minority members. Absent the one-person, one-vote rule -- that the vote of each individual voter must be roughly equal in

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[11] It is interestig to note that the dissent from the panel opinion, in the very course of complaining of the majority's refusal to apply Section2 to trial judges, candidadly recognizes that judges, unlike legislative and executive officers, "represent" no one:

> When weighing a state's claim that it has a compelling interest in retaining the existing at-large system, courts should keep in mind the common sense notion that the role of judges differs from that of legislative and executive officials. Since it is not the role of judges to "represent" their constituents an examination of the "responsiveness" of the elected official to minority concerns is clearly irrelevant.

902 F.2d at 317 n.17.

weight to the vote of every other individual voters, regardless of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside -- there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the nonexistent wrong complained of here.

The notion of *individual* vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533 (1964), was the foundation for the concept of *minority* vote dilution to be later elaborated in *Whitcomb v. Chavis*, 403 U.S. 124 (1971)[12], *White v. Regester*, *supra*, and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of one-person, one-vote -- the guarantee of substantial equality

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[12] In *Whitcomb v. Chavis* the Supreme Court directly considered a racial dilution challenge and rejected the claim that the Indiana legislative reapportionment plan operated to minimize or cancel out minority voting strength. The Court held that the mere fact that ghetto residents were not proportionately represented did not prove a consitutional violation unless they were denied equal access to the political process.

among individual voters. With that guarantee in mind, remedial schemes to combat minority vote dilution were devised on a case by case basis.

Almost twenty years ago, we articulated the conceptual link between individual vote dilution and minority vote dilution, making clear the latter's dependence on the former:

> Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that *assuming substantial equality*, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population.

Zimmer, 485 F.2d at 1303 (emphasis added).

For it is the assumption of substantial equality (achieved through the guarantee of one-person, one-vote) that underlies the concept of minority vote dilution. This assumption, the Court held in *Wells*, does not obtain in judicial elections; and without that assumption there exists no yardstick by which to measure either the "correct" magnitude of minority voting strength or the degree of minority vote dilution.

Thus, on a conceptual level, and to paraphrase Justice Harlan, we are asked to undertake the ineffable task of equalizing that which we cannot measure. *Whitcomb*, 403 U.S. at 169 (Harlan, J., separate opinion).

We are therefore unable to take the crucial step from individual vote dilution to minority vote dilution in this case, not only because the holding in *Wells* forbids us to *assume* the existence of "substantial equality," but because it compels us to recognize that no such equality need exist in the arena of judicial elections. The bridge between the two concepts, fashioned by the Court in *Reynolds v. Sims* and applied there to state legislatures, is of limited length and, as the Court made clear by affirming *Wells v. Edwards*, does not extend to the judiciary.

Finally, as the district court stated in *Wells*:

> The primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents.

Wells, 347 F. Supp. at 455.

We reiterate that judges do not represent people and, thus, have no constituents. Judges speak the voice of the law. In doing so they speak for and to the *entire* community, never for segments of it and still less for particular individuals. To describe the judge's office merely as "not a representative one" is a gross understatement; in truth, it is rather the precise antithesis of such an office. Just insofar as a judge *does* represent anyone, he is not a judge but a partisan.

New Subsection 2(b)

So the land lay when Congress enacted Section 2(b) in 1982, choosing to replace the term "legislator" in the *White* phraseology with the term "representative" -- a term which is employed only at this spot and appears nowhere else in the entire Voting Rights Act. By the settled canon of construction, we must presume that Congress was aware of the uniform construction which had been placed by the courts on the term that it selected, a construction by which the judicial office was not deemed a "representative" one.

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988); *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1987). Against this background, then, the Congress deliberately picked a term of art for use in amending Section 2 that up to that time had been universally held, and which it *knew* had been universally held by every federal court that had considered it as of that date, neither to include judges nor to comprise judicial offices. In view of these circumstances, we find it all but impossible to avoid the conclusion that Congress intended to apply its newly imposed results test to elections for representative, political offices but not to vote dilution claims in judicial contests, leaving the latter to be regulated and controlled by state law, by the Constitution, or by other provisions of the Voting Rights Act.[13] Given the

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[13] Indeed, as the panel opinion correctly notes, many states of the Union over the course of their history have maintained an appointive judiciary, and some do so today. 902 F.2d, at 296. Given the fact, also noted there, that none of the original thirteen states elected its judiciary, an appointive system must be viewed as consistent with the "Republican Form of Government" guaranteed the States by Article 4, Section 4, of the Constitution.

In view of this, and while it is certainly possible to imagine

mutual exclusiveness of the two terms, to suggest that Congress chose "representatives" with the intent of including judges is roughly on a par with suggesting that the term *night* may, in a given circumstance, properly be read to include *day*.

We are further persuaded by the knowledge that in amending Section 2 Congress was well aware of the genesis of the concept of minority vote dilution. The legislative history makes clear that Congress knew that "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*." S. Rep. No. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News at 196. Given its awareness of the

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Congress's taking the position that, while states need not elect judges, if they do so they must do so on exactly the same terms as they elect representatives, the view which it adopted seems at least equally cogent: that since the office of the judge is not to represent the popular will, and since judges are not expected to initiate significant departures in law or policy, the states need not be subjected in their selection or election to so severe and intrusive a provision as one applying a "results" test to claims of minority vote dilution.

Wells v. Edwards holding -- that the one-person, one vote rule does not apply to the judiciary -- we must conclude that Congress, aware of the combined effect of *Reynolds* and *Wells*, limited the scope of amended Section 2 so as to rule out the judicial branch, an area within which the issue of the viability of minority vote dilution claims had been well settled.

Countervailing Arguments

Thus we find on one side of the argument whether Section 2(b)'s results test for elections applies to judicial ones the Congress's carefully chosen term of art -- "representatives" -- deliberately selected by Congress and placed in the section itself, with a settled legal meaning excluding judges. One the other side are ranged contentions of a more attenuated and derivative nature, which we now consider briefly.

First we are told that the definition of "voting," included in the original act as Section 14(c(1) and now

codified as 42 U.S.C. 1973(1)(c)(1), refers to "candidates for public or party office" and that, since judicial hopefuls are included within the generality of such a reference to candidates, the results test which applies to all others must be applied to them as well. The specific controls the general here, however, as in any other instance of statutory construction; and we see little force in the claim that an inference from a general term buried in a definitional section far from Section 2 should control the specific and supervening language inserted by Congress in the section itself. Nor is there any necessary conflict between the two provisions: as we have noted, it is only the application of the results test portion of amended Section 2 to vote dilution claims in judicial elections that is at issue today. Other portions of the section may well apply to such elections, as may the results test to claims other than those of vote dilution, along with the indubitably applicable Constitutional prohibitions against any intentional act of discrimination in

any electoral aspect.

The same answer also refutes the next argument: that because, as was held in *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986), Section 5 of the Act applies to state judicial elections, Section 2 must apply as well. As we have explained, portions of Section 2 may well apply -- except for the results test introduced in response to the holding in *Bolden* to govern vote dilution in the election of "representatives," which by its own terms does not.

Next we are told, in yet another general argument similar to those we have just rejected, that we must apply the dilution results test to judicial elections because the 1982 amendments to Section 2 were intended to expand, rather than to restrict, the section's coverage. Doubtless they were generally so intended; doubtless they did so; but the presence of a general intent to expand coverage requires neither an expansion at all points nor the maximum imaginable

expansion at any and is not even necessarily at odds with a specific intent to restrict coverage at one or another of them. Section 2 was greatly expanded, expanded to add a results test to the intent test of the Fourteenth and Fifteenth Amendments -- expanded in most respects, but not in all.

Finally, in a scatter of birdshot contentions, counsel point to the broad construction that the Attorney General has historically accorded the Voting Rights Act, to the absence in the Act's legislative history of any explicit statement that judicial elections are *not* covered, to the presence in that history of references to statistics on minority performance in various elections (including judicial ones), and to a single reference to "judicial districts" in a cautionary parade of horribles to be found in a subcommittee report hostile to the proposed 1982 amendments. None of these seems to us to weigh very heavily in the scales against the specific

terminology of Section 2 itself.[14] In the words of Justice Frankfurter, writing for a unanimous court in *Greenwood v. United States*, it appears to us that "this is a care for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." 350 U.S. 366, 374 (1955).

It is, and we do so.

Conclusion

In no area should federal courts tread more cautiously than where it is contended that Congress has imposed incremental Federal power on the States; and the nearer to

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[14] . Thus, as Justice Scalia has very recently suggested, we "appl[y] to the text of the statute the standard tools of legal reasoning, instead of scouring the legislative history for some scrap that is on point . . . ." *Begier v. United States*, ___ U.S. ____, ____; 110 L.Ed.2d 46, 63 (1990) (concurrence in judgment).

And these small matters are indeed scourings. The panel opinion avers, 902 F.2d at 299, and we do not doubt, that the reference to "judicial districts" is the sole ference to the judiciary in all the legislative history of the 1982 amendments of the Act. It will be noted that even this reference is one to judicial *districts*, not to judicial candidates; and in our Circuit many officials such as sheriffs, highway commissioners, district attorneys and clerks of court, who are "representatives" and not judges, are elected from judicial districts, *e.g.*, Miss. Code Ann. (1972) 65-1-3.

the core of traditional state authority and concern we are asked to venture, the more warily we should tread. The point is elegantly made by the panel opinion in this very case:

> Few would quarrel with the assertion that Section 2(b) as interpreted has worked a fundamental change in the Act, highly intrusive to the states. We have insisted in other contexts that Congress clearly state its intent to supplant traditional state prerogatives. Judicial insistence upon clear statement is an important interpretative tool vindicating concern for separation of powers and federalism. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984) (*Pennhurst II*). This insistence upon an "unequivocal expression of congressional intent," *Pennhurst II*, 465 U.S. at 99, 104 S.Ct. at 907, is based upon the fundamental nature of the interests at stake. "The 'constitutionally mandated balance of power' between the states and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero*, 105 S.Ct. at 3147 (quoting *Garcia v. San Antonio Metropolitan Transport Authority*, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028 (1985) (Powell, J., dissenting)).

LULAC, 902 F.2d at 301.

It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed. Instead, as regards the issue in this case, our investigation reveals an all but total absence of relevant legislative history and a statutory text that unambiguously excludes elections of non-representative state officers from Section 2's highly intrusive results test. If this was not the intended effect of Congress's substitution of *representatives* for *legislators* in Justice White's language, no other suggests itself; and we must reject any notion that Congress went to all the trouble of selecting that language and carefully modifying it, just so far and no further, randomly and with nothing particular in mind.[16] It is never

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[16] Both the dissent and, more obliquely, the special concurrence take our writing to task as resting on the narrow foundation of one word. In main, this is true; for the substitution of the term "representative" is all but the sole clue to be found -- in either the

proper for us to extend a statute's force by construction into areas where Congress has not seen fit or has been unable to agree to go, and never less proper than in such supremely sensitive territory as this.

Judicial offices and judicial selection processes are sui generis in our nation's political system; they determine the referees in our majoritarian political game. These offices are not "representative" ones, and their occupants are not representatives. Indeed, the state processes for filling them need not even be elective, as those for all representative offices presumably must be. *See* U.S. Const., Art. 4, Sec. 4. In 1982, when Congress determined to expand Section 2 of the Act to incorporate a results test for vote dilution, it

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statutory text or the legislative history -- to guide the interpreter in unraveling the legislative intent behind this enigmatic statute. Dim or no, it is the only light available to guide our footsteps, and we have followed it as best we could.

By contrast, our specially concurring and dissenting brethren proceed by ignoring the sole guide available, first declaring that the only light that shines is of no help, then proceeding in total darkness and, so proceeding, to declare that the statute means, not what it says, but what they think Congress should said -- pausing briefly in passing to accuse our majority of doing what they in fact have done themselves.

stopped short of imposing such a test for judicial offices on the States by limiting it to their election of "representatives." Should Congress seek to install such a test for judicial elections, it must say so plainly. Instead, it has thus far plainly said the contrary. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988) is overruled.

REVERSED.

CLARK, Chief Judge, concurring specially: This brief soliloquy is necessarily said, in my respectful view, because every other opinion goes farther than the Voting Rights Act intends. My brothers Gee and Higginbotham are at odds about the way the court should take to reach the same result. While their disagreement centers on the representative nature of the judicial office, the essence of their analyses of the impact of racial vote dilution in this judicial election process based on the nature of the office is similar--so similar that, if their opinions were expressly limited to the facts of the present case, I agree with both.

There is no disagreement that Section 2 of the Voting Rights Act, before its amendment, forbade *any* practice or procedure that abridged the right to vote because of race or color. All also agree that the legislative intent of the amendment was only to broaden the test for vote dilution from "intent" to "result."

The elements of Judge Gee's analysis are that, since section 2(b) defines vote dilution in terms of representatives, no vote dilution claim can be made in any election of a judicial officer because a judge can never be a representative--a conclusion he finds confirmed by the Supreme Court's refusal in *Wells v. Edwards* to apply one-man, one-vote standards to judicial election districts.

Judge Higginbotham rejects this analysis. He would base reversal on the premise that none of several elected trial judges who all function singularly in their work can be subject to the single-member redistricting claim made here. My concern is that the court's opinion, as now written, puts vote dilution attacks on (1) judicial elections which cannot be resolved by examining the nature of the office, and (2) "issue" elections (such as referenda on constitutional amendments and bond issue elections) beyond the reach of amended section 2.

Judge Gee starts with the observation that the words of

section 2 expressly limit vote dilution to elections of representatives. I can readily agree section 2 does not apply to the elections challenged here. It involves only the election of persons and voter impact turns entirely on the nature of the judicial office. This brings section 2(b) into play. The inherent nature of the judicial function and, indeed, the constitutional limits of due process require that every judge be impartial between litigants and neutral as to claims presented. In the discharge of official duties, no judge can ever "represent" the electors in the jurisdiction served by the court. A vote for a judge differs from a vote for other types of officers. Whether the choice be for councilman, sheriff or governor, and whether it be based on whim or party or nonpartisan analysis of the individual candidate, votes for these types of officials are cast for those who will best express the wishes and views of their constituents. This cannot be so when a voter picks a judge. Legislators and executives are expected to represent. Voters must know

judges cannot. The same principles control when a state provides for election rather than appointment of its judiciary. The choice seeks to assure the public that the judicial function will be kept accountable to the common sense of the electorate. It is expected that candidates who lack training or a reputation for honesty or sound intellect will not be elected. In like manner, those who are indolent, will not decide cases or decide erratically will not be reelected. Overarching any considerations of voter motivation is the due process neutrality required in the conduct of the office. It does not permit the judge's responsiveness to the electorate's concept of common sense to become representation of the electorate. The State of Texas has a strong interest, and, indeed, a fundamental right to choose to have these judges elected in the manner provided here. Its choice does not violate amended section 2.

The difficulty I have with Judge Gee's analysis is that it has no limit. There are many types of elections which

involve issues, not candidates, which surely ought to be subject to the vote dilution stricture of section 2 despite the absence of any question of representation. But merely noting the applicability to "issue" elections would not adequately define the reach of section 2. It is imperative, in my view, that a bright circle be drawn around judicial elections as well. Judge Gee's reasoning would expressly deny section 2(a) coverage to judicial elections in situations beyond today's facts, as he makes clear by overruling *Chisom v. Edwards*. Section 2(a) is an integral part of a remedial statute. It deserves to be interpreted so as to prevent racial vote abridgment even when it occurs in a judicial election. The phrase "as provided in subsection (b) of this section" which appears at the end of subsection (a) should be read as giving an example of proscribed vote dilution. It does not provide that section 2(b) establishes the *only* way the section can be violated.

It is clear to me that when a state continues to apply a

voting procedure in a manner which now results in an abridgement of the right of a citizen to vote on account of race, that procedure is still condemned by amended section 2(a), just as it was before the amendment.

Nothing we say today should be taken as passing on a claim that a judicial election process in which judges are elected by fewer than all of the eligible voters within the jurisdictional area of the court c.. which the judge will serve has become a violation of section 2. Such elections involve districting of voters in a manner entirely unrelated to the representative nature of the judge's office.

Gingles tells me that whether the political process chosen by Texas for selecting its judges is equally open depends upon evaluation of past and present reality under a functional view of the process. There is nothing wrong with the state's choice to elect any number of a county's district judges county-wide. However, if the state has chosen to divide a single judicial jurisdiction into separate groups of

electors, that choice could, with changes in demographics or other conditions come to raise real issues of racial gerrymander, gross diminution of voting strength, candidate slating ability or other violations of equal protection which have nothing to do with the due process concerns which control the execution of judicial duties, or with the manner in which the office of judge is carried out. Of course, I agree that Wells v. Edwards establishes that approximate numeric equality of voters between judicial districts is not required. However, we need not and should not decide now that judicial subdistricts which grow to have gross numeric or racial disparities in their make-up will always be free of possible section 2 problems. For this reason, I respectfully, but expressly, disagree with the majority's flat-out overruling of *Chisom v. Edwards*.

We are not confronted here with any claim of vote dilution resulting from long-established subdistricts alleged to have become racially invidious on a basis of intra-

jurisdictional voter distribution. This was the claim that was before this court in *Chisom*. The *holding* in *Chisom* reversed a dismissal on the pleadings. I agree that such a reversal was proper, even though I cannot agree with all said in Part I of Judge Higginbotham's concurrence or Judge Johnson's dissent because both deny vitality to section 2(b). Since we are writing en banc, I am free to disagree with the *reason* given for the result in *Chisom*--that section 2 applies to all judicial elections. I am of the opinion that it is equally wrong to say that section 2 covers *all* judicial elections as it is to say it covers *none*. However, if today's facts were the same as *Chisom*'s, I would hold a claim that judicial subdistricts, once having no invidious purpose, but alleged, over time, to have come to abridge section 2 rights, must be factually developed and cannot be dismissed on pleadings alone.

If the issue were reached in today's case, I would also agree with Judge Higginbotham that the presence of multiple

judicial posts on the ballots of plaintiffs here gives them no section 2 right to have single-judge subdistricts drawn. I would do so because I am not required to agree that the principle applies on any broader scale then the facts before us present. His function-of-the-office analysis is, to me, identical in concept to the majority view. The caveat I think must be added to both is that only when the area of jurisdiction of each of several jurist to be elected is coextensive with the area of residence of those that elect them, is each vote for a judge bound to be equal to every other vote that may be cast.

I would not agree with Judge Higginbotham that the single-judge, trial-court function of the judicial office is a critical factor. The analysis ought to be the same regardless of how the judge judges. When an appellate judge--who must function with other appellate judges to accomplish the judicial task-serves the same jurisdictional area as that which defines the electorate, section 2 does not allow a single

member subdistricting remedy to be applied. This is so because no intradistrict or intrastate violation of section 2 is possible. The collegial nature of the appellate office in no way alters the compulsion for due process neutrality. When this neutrality is coupled with congruence of jurisdiction and electorate, they jointly assure equality in voting practices and procedures, negate representation and eliminate the possibility of vote dilution.

However, as with my partial agreement with Judge Gee's analysis, agreement with Judge Higginbotham should not be taken as controlling fact situations not before us here. The single-judge, trial-court functional analysis proceeds solely on what the judge does and the way he does it. These analyses change no basic principles. If the coincidence of voter residence and jurisdiction does not exist, the same possible vote dilution violations mentioned above, which have nothing to do with the function of the office being voted on, could occur. The importance of the policy

embodied in section 2 compels me to say that these limits must be placed on what we write so that future courts will not cut short the intended reach of section 2. In my view, the majority view should be limited to the facts before us.

With the reservations expressed, I respectfully concur in reversing the judgment appealed from.

HIGGINBOTHAM, Circuit Judge, with whom, POLITZ, KING and DAVIS, join, concurring in the judgment.* JOHNSON, Circuit Judge, concurs in Part 1. WIENER, Circuit Judge, concurs in Part 2.

This is a voting rights suit challenging the election of district judges on a county-wide basis in Texas. The suit was filed in a United States District Court by the League of United Latin American Citizens against the Attorney General of Texas, the Secretary of State, and other state officials, seeking a declaratory judgment that the at-large election of state district judges in nine targeted counties is illegal under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and violative of the fourteenth and fifteenth amendments of the

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*When this case was orally argued before and considered by the court, Judge Reavley was in active service. He participated in both the oral argument and the en banc conference. He took senior status, however, on August 1, 1990. Based on his understanding of the Supreme Court decision in *United States v. American-Foreign Steamsip Corp.*, 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1490 (1960), he considers himself ineligible to participate in the decision of this case, but he adheres to the views in this opinion. See *Sawyer v. Butler*, 881 F.2d 1273 (5th cir. 1989) and Court Policy 21.C.

United States Constitution. Plaintiffs requested the district court to enjoin further elections and to impose a districting scheme that included single-member districts. Texas has 254 counties, but the suit attacked only Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector, and Midland Counties[2] These nine counties have more than one district judge elected county-wide, and elected 172 of the state's 390 district judges. As we will explain, the suit targets Texas law requiring election of a state district judge from a district no smaller than the county, the geographical area of its jurisdiction.

After a bench trial, the district court found violations of the Voting Rights Act in each of the nine counties, but rejected the constitutional arguments, finding that plaintiffs had failed to prove that the electoral system was instituted or maintained with discriminatory intent. On January 2, 1990,

[2] Ten counties actually are targeted. The challenged 72nd Judicial District encompasses two counties, Lubbock and Crosby. We will refer to the nine targeted Judicial Districts as nine counties.

the district court enjoined defendants from:

> Calling, holding, supervising and certifying elections for state district judges in Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Hector and Midland Counties under the current at-large system with an order for interim relief.

The district court divided the nine counties into electoral subdistricts, tracing the districts of state representatives and the precinct lines of County Commissioners or Justices of the Peace. The district court's order affected 115 of the 172 district courts. The district court also ordered a non-partisan election for May 5, 1990, with any run-off to be held on June 2, 1990. We stayed the district court's order pending this appeal.

Defendants first argue that the Voting Rights Act as amended in 1982 has no application to the election of judges. This argument rests on the assertion that the use by Congress of the word "representatives" in Section 2(b), added by amendment in 1982 and popularly known as the Dole compromise, unambiguously excluded elected judges because

elected judges are not representatives. This argument in its broadest form--Section 2 of the Act has no application to any judicial elections--was rejected by this court in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom. Roemer v. Chisom*, 109 S.Ct. 390 (1988). The panel opinion was unanimous. The petition for rehearing en banc was denied without a single member of the court requesting a poll. Relatedly, but with less sweep, defendants argue that Section 2(b) has no application to state district judges because such judges do their judging singly and not as part of a collegial body. Finally, defendants attack the findings below as well as the ordered remedy. In addition to quarrels with the sufficiency of proof that the votes of minorities were diluted, defendants argue that the findings are flawed by the erroneous legal conclusion that the contribution of partisan voting to election outcomes is not relevant.

We are unpersuaded that *Chisom*'s decision regarding the election of appellate judges was incorrect, but are

persuaded that Section 2(b) will not support this attack upon the countywide election of trial judges. Because we would decide the case on this ground we do not reach defendants' other contentions.

I.

A.

We are pointed to no evidence of how the Framers' viewed elected judges. This is not surprising; judges were not elected at the time the Constitution was written and ratified. The thirteen original states employed various methods of judicial selection, seven using appointment by the legislature, five by governor and council, and one by governor and legislature. See Winters, *Selection of Judges--an Historical Introduction,* 44 Tex. L. Rev. 1081, 1082 (1966). Electing judges was a Jacksonian reform aimed at making judicial selection more democratic:

> Popular sovereignty and popular control of public affairs through the elective system were hallmarks of the Jacksonian era, and, not surprisingly, the movement for popular election of judges dates from this period.

> Dissatisfaction with the judiciary was widespread among Jacksonians. It arose from several factors including a general disaffection with the legal profession, abuses in the judicial appointment systems, and a feeling, carried over from the Jeffersonian period, that the courts were basically undemocratic. Consequently, the abolition of tenure during good behavior and the adoption of the elective system were advocated as reform measures and were hailed as in accord with the egalitarian spirit of the times.

Note, *The Equal Population Principle: Does It Apply to Elected Judges?*, 47 Notre Dame L. Rev. 316, 317 (1971).

The first judicial elections took place as early as 1812 for Georgia lower court judges, Ga. Const. art. III, § 4 (1812), and in 1832 Mississippi adopted a completely elective judiciary. Miss. Const. art. IV, §§ 2, 11, 16 (1832). When it joined the Union, Texas ironically became the first new state to adopt the federal method of selecting judges, by executive appointment with confirmation by the state senate. Id.; Tex. Const. art. IV., Section 5 (1845). The wholesale change from appointed to elected judges can be marked by New York's adoption of judicial elections in 1846. N.Y. Const. art. VI, §§ 2, 4, 12, 14 (1846). All

new states entering the union after that date, until the entrance of Alaska in 1958, used elections as their method of judicial selection, and Georgia, Maryland, Virginia, and Pennsylvania switched from appointment to election. Winters, *Selection of Judges*, 44 Tex. L. Rev. at 1082. In short, it is fair to conclude that electing judges was viewed as being more democratic and as a way of ensuring that judges remained sensitive to the concerns of the people.

It is vigorously argued that Section 2 of the Voting Rights Act has no application to judicial elections because judges are not representatives. The argument in its strongest form is that the word "representatives," found in Section 2(b), unambiguously excludes judges because judges have no constituents. The argument continues that there is no occasion for exploring legislative history because the inquiry ends with the plain words of the statute. While drawing the language of Section 2(b) from *White v. Regester*, 412 U.S. 755 (1973) Congress substituted the word "representatives"

for "legislators," at the least to insure it reached elected executive officials. This much defendants do not deny. Rather, they argue that although "representatives" may encompass executive officials, Congress intended that the term not encompass judges.

To be unambiguously inapplicable to judges, the word "representatives" must be certain of only one relevant meaning and that meaning must exclude judges. Defendants must concede, however, that at one level of generality judges are representatives. The history of electing judges and the political impulses behind that choice are powerful evidence of considered decisions to keep judges sensitive to the concerns of the people and responsive to their changing will. This reality belies the bold assertion that judges are in no sense representatives. The assertion that judges are not representatives actually masks a concern that judges should not be representatives. This is a choice left to the states, and Texas has chosen to elect judges convinced that direct

accountability insures that judges represent the people in their judicial tasks.

Judges are oath bound to obey the law and to make decisions in an impartial manner but that does not mean that they are in no practical sense representatives of the people. Yet, executive officials, who are considered representatives, are bound by the same oath. While judges are indeed far removed from the logrolling give and take of the legislative and even executive processes, the effort to assure "sensitivity" and "accountability" through elections is no more than an insistence that the judges represent the people in their task of deciding cases and expounding the law. State judges, wearing their common law hats, face decisions such as whether to adopt a comparative fault standard, and in doing so represent the people in a very real sense. At least at this level of generality judges are indisputably representatives of voters. Saying so in no way steps on the equally indisputable difference between judges and other

representatives--that judges do not represent a specific constituency.

It is true that judges do not carry the views of a certain group of people into a larger governmental body, attempting to sway that body toward decisions favorable to their constituency.[3] That is not the necessary role of a representative. We extol the virtues of the jury in criminal cases--the jury is said to be the *representatives* of the people. Both judicial opinions and academic writings describe members of juries as representatives. See *Spaziano v. Florida*, 104 S.Ct. 3154, 3176 (1984); *Gillers, Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 63-65 (1980); H. Kalven & H. Zeisel, *The American Jury* 436 (1966). The examples can be multiplied, but the point is plain. The conclusion that the word "representative" has the singular meaning of legislator is nothing more than an effort to substitute judicial will for that of Congress. It is an undisguised effort by

[3] The same may be said for county surveyors, treasurers, court clerks and a myriad of office holders.

judges to claim for judges an exemption from the Voting Rights Act. This exercise of raw judicial power claims for federal courts, power belonging to Congress and to the states. Texas has decided to elect its judges and Congress has decided to protect the rights of voters in those elections.[4]

In sum, we cannot determine whether Section 2(b) of the Voting Rights Act applies to judicial elections by looking only to the word "representative." Rather, we must look to the context in which the word is used and legislative history, cautious as we must be over that enterprise. Exploration of this context requires that we determine whether in using the word representative in the 1982 amendments, Congress intended to withdraw the Act's existing coverage of judicial elections. That is, the freight the majority's use of representative must bear becomes enormous if, before the

[4] It is argued that, whether or not the unamended Section 2 reached judicial elections is irrelevant, because Section 2(b) represents not just an amendment to but a fundamental shift in the operation of the Act. As such, the amended Section 2 should not be read to reach judicial elections unless Congress explicitly so provided. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985). We refute this argument in the text below.

1982 amendments, the Voting Rights Act reached judicial elections.[5]

We therefore turn first to whether the Voting Rights Act covered judicial elections before 1982. We consider the 1982 amendments to the Act and review the legislative history of the amendments. We then turn to the question whether Congress was required to mention specifically the election of judges in the statute. The resolution of this question is informed by application of settled principles of federalism; we determine that the election of judges has no claim to the protections of federalism not shared by other institutions of state government. We next reject the argument that because the one-person, one-vote principle is inapplicable to the judiciary, racial vote-dilution claims under Section 2 must be inapplicable as well. Finally, we look at

[5] It is argued that, whether or not the unamended Section 2 reached judicial elections is irrelevant, because Section 2(b) represents not just an amendment to but a fundamental shift in the operation of the Act. As such, the amdned Section 2 should not be read to reach judicial elections unless Congress explicitly so provided. See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985). We refute this argument in the text below.

the interplay of Sections 2 and 5 to determine whether differences between the two sections preclude the application of Section 2 to judicial elections despite Section 5's coverage of those same elections, and conclude that they do not.

B.

Section 2, before the 1982 amendments, provided as follows:

> § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites.
>
> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1975).

Section 2 by its express terms reached state judicial elections. "Vote" or "voting" was defined as including "all action necessary to make a vote effective in any primary, special or general election . . . with respect to candidates for public or party office and propositions for which votes

are received in an election." 42 U.S.C. § 1973*l*(c)(1). There was no mention of judges or the judiciary. There also was no mention of any other specific office. Judges are "candidates for public or party office" elected in a "primary, special, or general election." Congress intended to reach all types of elections, rather than to pick and choose. Indeed, even votes on propositions are within the purview of the Act. Section 14(c)(1), 42 U.S.C. § 1973*l*(c)(1).

Defendants argue that the Act is silent as to judges, so it must be construed as not including judicial elections. They argue that, while judges in Texas are "candidates for public office," it is uncertain whether Congress, by providing a broad definition of "vote," also intended to create a private remedial cause of action of similar scope in Section 2. Congress expressly defined the term "vote" or "voting," however, and nothing suggests that Congress did not intend that definition to apply throughout the Act, including Section 2.

Congress intended that its 1965 Act provide protection coextensive with the Constitution. Justice Stewart reiterated this in *Mobile v. Bolden*:

> [I]t is apparent that the language of section 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of section 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself . . . .

446 U.S. 55, 60-61 (1980). We reject the implicit suggestion that the protections of the Fifteenth Amendment do not extend to minorities whose right to vote in judicial elections is abridged. The Fifteenth Amendment applies to all elections, and Congress intended the Voting Rights Act of 1965 to apply to all elections.

By its terms the 1965 Act included judicial elections. Under defendants' argument then the word representative in Section 2(b) must bear the burden of being the sole means by which Congress in the 1982 amendments exempted judicial elections from the Act's coverage. The record is barren of any hint that Congress's effort in 1982 to expand

the Voting Rights Act carried a sub rosa withdrawal of coverage for state judicial elections.

C.

Congress amended Section 2 in 1982 in partial response to the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *Thornburgh v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 2758 (1986). Bolden held that in order to establish a violation under Section 2 of the Act a plaintiff must prove purposeful racial discrimination. Bolden, 446 U.S. at 66. Congress incorporated a "results test" into Section 2(a) to diminish the burden of proof necessary to prove a violation. Congress also added Section 2(b), which codified the legal standards enunciated in *White v. Regester*, 412 U.S. 755 (1973).[5]

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[5] In *White v. Regester* the Supreme Court interpreted the requirements of the Voting Rights Act and the U.S. Constitution with respect to claims of vote dilution:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

As amended in 1982, Section 2 now provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

The plain language of Section 2(a) reaches judicial elections, using the same broad language as the 1965 Act,

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412 U.S. at 766.

referring generally to "voting" and "vote," the definitions of which continued unchanged under the 1982 amendments. The legislative history of the 1982 amendments does not indicate that the terms "vote" or "voting" do not include judicial elections, or that "candidates for public office" does not include judges. While retaining the identical statutory reach, Congress added the word "results" as the measure of violation. The word representative does not appear in subsection (a).

Section 2(b) is a new section added in the 1982 amendments. Section 2(a) refers to "denial or abridgement of the right . . . to vote on account of race or color . . ., as provided in subsection (b) of this section." Section 2(a) anticipates that subsection (b) will define how a violation of subsection (a) can be established. Other than the previously discussed vague use of the word "representative," there is no reason to suppose that subsection (b), defining a type of proof sufficient under Section 2, was meant to withdraw all

coverage from judicial elections. Before we turn to the legislative history of the 1982 amendments for evidence of intent to exclude judicial elections from coverage, we pause to emphasize that the exercise is itself not necessary. A straightforward reading of both Section 2(a) and 2(b) leaves little doubt but that 2(a)'s broad reach was never intended to be limited by use of the word representative in the explanation in Section 2(b) of how a violation might be shown.

Congress used the word "candidates" interchangeably with "representatives" in the legislative history. There was no indication that "representatives" was intended to have a limited meaning, applying only to legislative and executive officials, but not to elected members of the judiciary. Even Senator Dole, who proposed the language of compromise in Section 2, stated:

> Citizens of all races are entitled to have an equal chance of electing *candidates* of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress.

S. Rep. No. 417, 97th Cong., 2d Sess. 193 (Additional Views of Senator Robert Dole), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 364 (emphasis added), and

> [T]he standard is whether the political processes are equally "open" in that members of a protected class have the same *opportunity* as others to participate in the political process and to elect *candidates* of their choice.

Id. (emphasis added).

In the one place where the judiciary is specifically mentioned in the legislative history of the 1982 amendments, the report of the subcommittee on the Constitution states that the term "'political subdivision' encompasses *all* governmental units, including city and county councils, school boards, *judicial districts*, utility districts, as well as state legislatures." Report of the Subcommittee on the Constitution of the Committee of the Judiciary, S. Rep. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 323 (emphasis added). Of course, a brief statement in a subcommittee report opposing the amendments is not much. Nonetheless, the proponents of

the changes to the Act did not contest this description, although they would have had incentive to do so to alleviate any fears of such extended coverage if such a broad scope of applicability were not intended.

The Senate and House hearings regarding the 1982 amendments contain various references to judicial elections, primarily in the context of statistics presented to Congress indicating the progress made by minorities under the Act up to that date. The charts indicated when minorities were elected to office, and included judicial election results. See Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 3112, H.R. 3198, H.R. 3473 and H.R. 3498 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong. 1st Sess. 38, 193, 239, 280, 502, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981); Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the

Senate Comm. on the Judiciary, 97th Cong. 2d Sess. 669, 748, 788-89 (1982).

To summarize, the relevant legislative history concerning the 1982 amendments suggests that Section 2(b) was intended to reach all elections, including judicial elections. There is no hint that Congress intended to withdraw coverage.

But, it is argued, even if other aspects of Voting Rights law do apply to judicial elections, nonetheless, vote-dilution claims should not, because these claims are a new and fundamentally different ground for relief under amended Section 2 and because anti-dilution remedies are particularly intrusive on the judiciary. Therefore, the argument continues, had Congress intended the Act to apply to judicial elections, it should have said so explicitly, which it did not. We reject this argument that Congress singled out both judicial elections and dilution claims for distinct treatment. In plain language it argues that Congress affirmatively turned

its head away from the dilution of minority votes in judicial elections.

The first flaw in this argument is that vote-dilution claims were not newly authorized by amended Section 2. There were many vote dilution cases before 1982. The statutory prohibition of vote dilution by the Voting Rights Act is as old as the Act itself. It was first raised as early as 1965, the year of the Act's inception, when the Supreme Court observed

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.

Fortson v. Dorsey, 379 U.S. 433, 439 (1965). Vote-dilution claims were considered in *Burns v. Richardson*, 384 U.S. 73 (1966), and *Whitcomb v. Chavis*, 403 U.S. 124 (1972), where the plaintiffs were unsuccessful, and in *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v.*

McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd sub nom. East Carroll. *Parish School Board v. Marshall*, 424 U.S. 636 (1976), where the plaintiffs prevailed. These cases were decided under the results test. Finally *Mobile v. Bolden*, 446 U.S. 55 (1980), where the Supreme Court articulated the intent standard, was a dilution case. The 1965 Act, therefore, was considered to prohibit vote dilution as well as more straightforward denials of the right to vote. By its terms the act covered judicial elections. The 1982 amendments simply made it clear that results and not intent were the basis for finding a violation. However difficult in application the results test may have proved to be, the amendments to Section 2 did not themselves create a vote-dilution claim. To the contrary, the dilution of the voting strength of minorities was the accepted premise of the debate. Indeed *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), the source of the "senate factors" that became part of the congressionally required inquiry, was a

dilution case.

Much of the legislative history of the 1982 amendments indicates that Congress intended to return to pre-Bolden standards, and was not otherwise reaching for a new and more intrusive private cause of action. As we will explain, at least Senator Hatch feared the language of the 1982 amendment would be much more intrusive, expressing concern that its uncertainty would lead to proportional representation. His fear was fueled by the restoration of the results test, however, not dilution theory, which had been part of the voting rights law for at least seventeen years.

The principal focus of the House debates centered on Section 5, but the Senate debates were centered on the meaning of the Section 2 amendments. Nonetheless, there was some discussion in the House, and at least some witnesses argued that "the amended Section 2 . . . would restore to black Southerners the right to challenge alleged discriminatory election schemes which were developing

before Mobile, [and that] notwithstanding the Court's claim to the contrary in Mobile, the intent test first became a constitutional standard in 1976 with Washington v. Davis, an employment case." Boyd & Markman, The 1982 Amendments to the Voting Rights Act: A Legislative History, 40 Wash. & Lee L. Rev. 1347, 1366 (citing comments by James Blacksher and David Walbert). Congressman Sensenbrenner argued that the Rodino amendment to Section 2 was necessary in order to *clarify* the standard of proof required in order to establish violations of the Act. 127 Cong. Rec. H6850 (daily ed. Oct, 1981) at H6983.

In the Senate Report on the Amendments the purpose of the bill was stated as

> designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby *restores the legal standards* based upon the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in Mobile v. Bolden. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test *by codifying the leading pre-Bolden vote dilution case, White v. Regester.*

S. Rep. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News at 179 (emphasis added).

Senator Hatch opposed the change, arguing that it "would redefine the concept of 'discrimination' and would 'transform the Fifteenth Amendment and the Voting Rights Act from provisions designed to ensure equal access and equal opportunity in the electoral process to those designed to ensure equal outcome and equal success.'" Boyd, Voting Rights Act Amendments, 40 Wash. & Lee L. Rev. at 1389 (quoting Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2d Sess. 3 (1982)). But, Senator Mathias, a proponent of the bill, argued

> The House amendment is needed to clarify the burden of proof in voting discrimination cases and to remove the uncertainty caused by the failure of the Supreme Court to articulate a clear standard in the City of Mobile v. Bolden. . . . We are not trying to overrule the Court. The Court seems to be in some error about what the legislative intent was . . . . Prior to Bolden , a violation in voting discrimination cases [could] be shown

> by reference to a variety of factors that, when taken together, added up to a finding of illegal discrimination. But in Bolden, the plurality appears to have abandoned this totality of circumstances approach and to have replaced it with a requirement of specific evidence of intent . . . this is a requirement of a smoking gun, and I think it becomes a crippling blow to the overall effectiveness of the Act.

Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2d Sess. 3, 199 (1982).

Senator Hatch persisted that the results test represented a new test, but supporters of the bill took issue with this view. Laughlin McDonald of the ACLU argued that "[p]rior to Mobile, it was understood by lawyers trying these cases and by the judges who were hearing them that a violation of voting rights could be made out upon proof of a bad purpose or effect . . . Mobile had a dramatic effect on our cases." Id. at 369. Defenders of the amendment assumed that the results test represented a restatement of the law prior to Bolden.

Critics of the results test argued that even if the lower

federal courts had adopted a results test in their pre-Bolden interpretation of Section 2, the original intent of Congress had been the establishment of a test in Section 2 using the traditional standard of intent or purpose. Boyd, Voting Rights Act Amendments, 40 Wash. & Lee L. Rev. at 1405 (citing Appendix to Additional Views by Senator Hatch, S. Rep. NO. 417, 97th Cong., 2d Sess. 36 (1982)). Proponents responded by arguing that there was no evidence that Congress meant an intent test to apply. The Senate Report of the Committee on the Judiciary adopted this view, citing Attorney General Katzenbach's testimony during the hearings on the Voting Rights Act of 1965 to the effect that "Section 2 would ban 'any kind of practice . . . if its *purpose or effect* was to deny or abridge the right to vote on account of race or color." S. Rep. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News at 194 (citing Hearings on S. 1564 before the Committee on the Judiciary, 89th Cong., 1st Sess., 191 (1965)).

This legislative history generally indicates an intent to retain pre-Bolden standards rather than create a more intrusive new cause of action.[6] We have insisted in other contexts that Congress clearly state its intent to supplant traditional state prerogatives. Judicial insistence upon clear statement is an important interpretative tool vindicating concern for separation of powers and federalism. See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984) (Pennhurst II). This insistence upon "an unequivocal expression of congressional intent," Pennhurst II, 465 U.S. at 99, 104 S.Ct. at 907, is based upon the fundamental nature of the interests at stake, Atascadero, 105 S.Ct. at 3147 ("The 'constitutionally mandated balance of power' between the

[6] Of course, when the 1982 amendments are considered in light of the Supreme Court's interpretation in Gingles, we cannot conclude that the 1982 amendments to Section 2 worked no changes from the pre-Bolden interpretation of the Act. But this is what it became, not necessarily what it was when voted upon.

states and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'") (quoting *Garcia v. San Antonio Metropolitan Transport Authority*, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028 (Powell, J., dissenting)). These mighty principles do not carry us very far here. Congress *has* clearly expressed the Act's application to the states, and *has* clearly expressed its intent that violations of the Act be determined by a results test rather than an intent standard. By these actions, the Act, with all of its intrusive effect, has been made to apply to the states. Significantly, the "results tests" did apply to all elections including judicial elections until the 1980 decision of Mobile v. Bolden, supra. Thus, intrusive as it is, the Act, including the anti-dilution provisions, applied to judges before the 1982 amendment. The suggestion that anti-dilution and results tests were introduced by the 1982 amendments is wrong.

The majority's argument is by necessity a demand for

the exemption of judicial elections from the Act as a whole. We cannot recognize this broad exemption.[7] Section 5, commonly seen as the most far reaching of the Voting Act provisions, see *South Carolina v. Katzenbach*, 383 U.S. 301, 358-62 (1966) (Black, J., dissenting), has allowed no escape for elected state judiciaries. *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd mem., 477 U.S. 901, 106 S.Ct.

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[7] Congress dispensed with proof of purposeful violation for *any* voting qualifications or prerequisites to voting or standard, practice or procedure "which *results* in a denial or abridgement. . . ." It did so by using the word results in *both* 2(a) and 2(b). The word representative, so critical to defendants' argument, does not appear in the broad prohibition of Section 2(a). The Senate Report explained that the results test apply to a variety of violations.

> For example, a violation could be proved by showing that the election officials made absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens. See *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968). Likewise, purging of voters could produce a discriminatory result if fair procedures were not followed. Toney v. White, 488 F.2d 310 (5th Cir. 1973), or if the need for a purge were not shown or if opporunities for re-registration were unduly limited. Administration of an election could likewise have a discriminatory result if, for example, the information provided to voters substantially misled them in a discriminatory way. *United States v. Post*, 297 F. Supp. 46, 50-51 (W.D. La. 1969), 412 U.S. at 769-770.

S. Rep. 97-417 n. 119 p. 208.

We decline to say that Congress intended to exempt state judicial elections from statutory regulation of these practices.

3268 (1986). As an inferior court we are bound by the holding of the Supreme Court that judicial elections are covered by Section 5 of the Act, a result explicitly urged by then Solicitor General Charles Fried and by then head of the Civil Rights Division, Assistant Attorney General William Bradford Reynolds. The same officials argued in Chisom that amended Section 2 of the Act is equally applicable, as does the present administration.

D.

Finally, it is argued that an elected state judiciary is somehow free of the anti-dilution prohibitions of the Voting Rights Act but remains subject to its other strictures. The argument has two premises: First, because the pre-Bolden anti-dilution cases did not involve judicial elections, Section 2's prohibition against vote dilution does not extend to judicial elections; second, because the one-person, one-vote principle has been held not to apply to judicial elections, vote-dilution claims under Section 2 do not apply either.

The first premise is obviously flawed. Nothing in the pre-Bolden cases suggests that the prohibition against vote dilution does not apply to judicial elections. That those cases involved elections of officials other than judges was happenstance; cases involving judicial elections simply had not yet come up. Furthermore, the statutory language cannot be parsed to read that judicial elections are not subject to dilution claims, but *are* subject to the remaining strictures of Section 2. This is so even if representative is found to mean elected members of the legislative and executive branches but not the judicial branches of state government. Further, concluding that Section 2 does not apply would create the anomaly that Section 5, conceded to reach elected judges, and Section 2 use identical language to define their reach. Section 2 either applies in its entirety or not at all and defendants' efforts to soften the full force of their extraordinary contention must fail.

The second premise--that because the one-person, one

vote principle does not apply to judicial elections, the vote-dilution prohibition does not either--must also fail. The prohibition of geographical discrimination in voting expressed in *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964), commonly referred to as the one-person, one-vote principle, was held not to apply to the apportionment of state judiciaries in *Wells v. Edwards*, 347 F. Supp. 453 (N.D. La. 1972) (3-judge court), aff'd mem., 409 U.S. 1095 (1973) (three justices, dissenting). It is argued that vote dilution principles cannot be applied to an elected judiciary because the one-man, one-vote principle does not apply, and without requiring equal apportionment there is no benchmark for concluding that there is vote dilution. This argument rests upon the equating of racial and non-racial acts by the state that deny voting strength. Yet they measure equality on quite different planes. One is facially neutral in the matter of race; indeed compliance may adversely affect black voting power. The

other rests on core concerns of the Civil War amendments--submerging of minority voting strength by the combined force of election methods and bigotry. In the more concrete terms of this case, that the state has chosen to allot thirty-some judges to Dallas County and only one to another county is not relevant. Submerging votes of protected minorities by a cohesive white majority is relevant.

It is perverse now to reason that because the elections of state judges are free of the Reynolds' command of numerical equality, an elected judiciary is a fortiori free from the racial equality commands of the Civil War Amendments and the Voting Rights Act. It is perverse because even the defenders of the "political thicket" doctrine at all times maintained that the courts must hold to the core values of the Civil War Amendments. For example, Justice Frankfurter, in his famous dissent to the Court's entry into the political thicket in Baker v. Carr admitted, joined by Justice Harlan, that "explicit and clear constitutional

imperatives guided judicial intervention in state government on the issue of black disenfranchisement." *Baker v. Carr*, 369 U.S. 186, 285-86 (1962) (Frankfurter, J., dissenting).

The courts have struggled to develop a measure of dilution stemming from the combination of racial voting patterns and state election practices. Gingles itself was the first detailing of that enterprise by the Supreme Court. At earlier times, various justices have referred to our efforts to do so in *Zimmer v. McKeithen* as amorphous. But, this difficulty has nothing to do with the inapplicability of the command of numerical equality, nor is its difficulty peculiar to judicial elections. We remind that the effort in this case to measure the submerging of black and Hispanic voting power *begins* with a system that is numerically perfect--county-wide elections.

We are pointed to several lower court opinions stating

that judges are not "representative."[8] These cases held that the prohibition against geographical discrimination does not reach judicial elections. The argument is that because many of these courts held that judges are not "representatives," Congress must have meant a similar exclusion in its use of the word. We disagree. Words come to their full meaning in context. This argument of incorporated definition is unsupported by a trace of legislative history and is no more

[8] See, e.g., *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy Dist.*, 473 F. Supp. 334 (S.D. Ohio 1977); *The Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. D.C. 1975), cert. denied, 424 U.S. 933 (1976); *Fahey v. Darigan*, 405 F. Supp. 1386 (D.C.R.I. 1975); *Gilday v. Board of Elections of Hamilton County, Ohio*, 472 F.2d 214 (6th Cir. 1972); *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La.), aff'd, 409 U.S. 1095 (1972); *Buchanan v. Gilligan*, 349 F. Supp. 569 (N.D. Ohio 1972); *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); *Irish v. Democratic-Farmer-Labor Party of Minnesota*, 287 F. Supp. 794 (D.C. Minn.), aff'd, 399 F.2d 119 (8th Cir. 1968). But cf. cases dealing with the Voting Rights Act, *Southern Christian Leadership Conference of Alabama v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989); *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987); *Lefkovits v. State Board of Elections*, 400 F. Supp. 1005 (N.D. Ill. 1975), aff'd, 424 U.S. 901 (1976). To the extent that any cases from the Sixth Circuit are used to support the proposition that Section 2 of the Voting Rights Act does not encompass judicial elections, they are no longer good law, for the Sixth Circuit specifically held in *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988), that Section 2 of the Voting Rights Act applies to judicial elections.

than an assertion. Indeed we showed above that Congress meant "representative" to include judges for the purposes of the Voting Rights Act. The Reynolds principle is race neutral, different, as we observed, from the race-based focus of the Voting Rights Act. However problematic locating the principle of one-person, one-vote in the fourteenth amendment may be, race-based concerns are at its core. Nothing in policy or logic suggests that declining to extend the Reynolds principle to judicial elections carries any sway in freeing judicial elections from race-focused concerns.

Wells was distinguished from cases challenging election practices in *Lefkovits v. State Board of Elections*, 400 F. Supp. 1005 (N.D. Ill. 1975) (3-judge court), aff'd mem., 424 U.S. 901 (1976), where the court stated:

> [W]hen a judge is to be elected or retained, regardless of the scheme of apportionment, the equal protection clause requires that every qualified elector be given an equal opportunity to vote and have his vote counted.

Id. at 1012. This was the precise point made by Solicitor General Fried in his successful argument to the Supreme

Court that it should summarily affirm Haith v. Martin.

In Haith the district court held that judicial elections are covered by Section 5 and the preclearance requirements of the Act. The district court found, using an analysis similar to that used by this circuit in Voter Information Project v. Baton Rouge, 612 F.2d 208 (5th Cir. 1980), that although the one-person, one-vote principle may not apply to judicial elections, claims with respect to the Voting Rights Act do not deal with numerical apportionment, but with discrimination. The court held that "the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F. Supp. at 413.[9] In short, Haith rejects the suggestion that inapplicability of the Reynolds principle is any barrier to the application of the Voting

[9] The changes required to be precleared in *Haith* had to do with the elections of trial judges. The district court did not reach the merits of any vote-dilution claims, for it had no jurisdiction to do so. New voting practices must be submitted to either the Attorney General or the United States District Court for the District of Columbia for preclearance. Other district courts only have jurisdiction to decide whether a practice is a change requiring preclearance. Consequently, the merits of a vote-dilution claim with respect to trial judges was not before the Supreme Court.

Rights Act. We are bound by Haith, and the relevance of that bind turns on whether Section 5, dealt with in Haith, and Section 2 are coextensive in their application to the judicial elections. We turn now to that question.

E.

Defendants have raised no compelling reason to distinguish between Section 5 and Section 2 with respect to their applicability to judicial elections. To distinguish the Sections would lead to the incongruous result that if a jurisdiction had a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if the state sought to introduce that very procedure as a change from existing procedures, it would be subject to Section 5 preclearance and could not be implemented. Sections 2 and 5 operate in tandem, with Section 2 prohibiting the continued use of discriminatory practices, and Section 5 preventing the imposition of new discriminatory practices to replace those condemned in those areas subject

to preclearance. Section 5 contains language defining its scope that is almost identical to the language in Section 2: "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ."

There are important differences in the two sections, however. Section 5 requires preclearance of any new voting practices and procedures, and, in determining whether or not a new practice is entitled to preclearance, only the effect of the new practice is considered. *City of Lockhart v. United States*, 460 U.S. 125, 103 S.Ct. 998 (1983); *Beer v. United States*, 425 U.S. 130 (1976). This has been described as a retrogression test, with preclearance denied only if the new practice has a retrogressive effect, rather than a results test, for the effects of the existing system on minorities are not considered. Thus in Section 2 the entire scheme of voting practices and procedures is considered to see whether it results in less than an equal opportunity to participate in the

political process, whereas under Section 5 only the effects of new practices and procedures are considered. Section 2 is, therefore, arguably more intrusive than Section 5,[10] for Section 5 only regulates whether or not changes may be implemented, whereas Section 2, if a violation is found, can lead to the dismantling of an entire system of voting practices that may have been in place for many years. This is a distinction between the two sections, but our question must be whether the difference means that Section 5 applies to judicial elections, but Section 2 does not. There appears to be no relevant reason why judicial elections are so different from legislative or executive elections that both

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[10] Some see Section 5 as being the most intrusive aspect ot the Voting Rights Act:

> This so-called "preclearance" requirement is one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a "substantial departure . . . from ordinary concepts of our federal system"; its encroachment on state sovereignty is significant and undeniable. The section must, therefore, be read and interpreted with care.

United States v. Sheffield Board of Comm'rs, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (footnote omitted). See also *Katzenbach*, 383 U.S. at 358-62 (Black, J., dissenting).

sections should apply to one and not the other.

The Voting Rights Act plainly covered judicial elections before the 1982 amendments. It is equally plain that there is little evidence that Congress intended any retrenchment by its 1982 amendments. In sum, defendants are left with the unconvincing argument that the changes of the 1982 amendments were fundamental in ways unique to judicial elections. Certainly, the Voting Rights Act intrudes heavily into state matters but it is no more specifically intrusive in judicial elections than in any others. We would hold that Section 2 of the Voting Rights Act applies to judicial elections.

II.

We now turn to the quarrel with the county-wide election of Texas trial judges. The Voting Rights Act does not purport to change the choices by a state of the duties and means for their discharge it gives to a particular office it chooses to create. Rather, the Act accepts these state

creatures but patrols for impermissible vote dilution of minority voting power caused by the features of the election process in combination with racially molded voting patterns in any election of such officials. The statute, however, gives no right to choose how the combination will be broken. It is important, then, that we keep in mind that the analysis of *Thornburg v. Gingles* is relevant only to an inquiry into whether an at-large election impermissibly dilutes minority voting strength; it is not a way of assessing every claimed vote dilution.

Texas has structure its government such that it wields judicial power at the trial level through trial judges acting separately, with a coterminous or linked electoral and jurisdictional base, each exercising the sum of judicial power at that level, and all with review by courts acting collegially. We are persuaded that, for purposes of the Voting Rights Act, because the fact and appearance of independence and fairness are so central to the judicial task, a state may

structure its judicial offices to assure their presence when the means chosen are undeniably directly tailored to the objective. The choice of means by Texas here--tying elective base and jurisdiction--defines the very manner by which Texas' judicial services are delivered at the trial court level. These means define the office. Nothing in the Voting Rights Act grants federal courts the power to tamper with these choices. It requires no narrow reading to conclude that the statute does not by its terms purport to do more. Stated in traditional fourteenth amendment terms, there is compelling necessity sufficient to overcome the strict scrutiny of state acts impinging upon a fundamental interest. We would not lightly suppose that the Voting Rights Act reached further than the Civil Rights Amendments except for dispensing with the requirement of purposeful violation.

It follows that inquiry into the Section 2 claims proceeds by accepting that trial judges are officials exercising the full authority of their positions alone whose full authority has its

source in the electors from a district coterminous with their jurisdiction. There can be no dilution of votes for a single judge because each judge holds a complete judicial office. This feature of the trial judge will alone decide this case but, as we will explain, we need not rest only on this proposition. Rather, that the trial judges act singly is also integral to the linking of jurisdiction and elective base.

A.

The district courts are the primary trial courts in Texas. Indeed, the constitution of the Republic of Texas provided:

> The Republic of Texas shall be divided into convenient judicial districts, not less than three, nor more than eight. There shall be appointed for each district a judge, who shall reside in the same, and hold the courts at such times and places as Congress may be law direct.

Guittard, Court Reform, Texas Style, 21 Sw. L.J. 451, 456 (1967). The first state constitution, adopted in 1845, contained essentially the same provision in article IV, section 6. This provision was amended in 1850 to allow for the election of district judges by the people, but the subsequent

constitution of 1861 provided that district judges were to be appointed. Tex. Const. art. V, § 7, interpretive commentary (1876, amended 1985). Texas constitutions adopted since 1861, including the current constitution, which was adopted in 1876, have provided for elected district judges.

All the constitutions have provided that the district courts are to be held by district judges chosen from defined districts, following the pattern of the Constitution of the Republic of Texas. Although in the Constitution of the Republic of Texas the number of district courts was limited to not more than eight, subsequent constitutions have left the number of courts to the legislature. All Texas constitutions, including the current one, before it was amended in 1985, suggested that each district would be served by only one judge. See Tex. Const. art V, § 7 (1876, amended 1985) ("[f]or each district there shall be elected . . . a Judge . . . ."). A one judge per district system, however, presupposes districts of substantially equal population.

Guittard, supra at 456. Thus, with the growth of the population in certain counties it became necessary for the legislature to make adjustments.

The system challenged in this case was set up according to this pattern. See Tex. Gov't Code §§ 24.001-.954 (Vernon 1988 & Supp. 1990). With the exception of the 72nd district, each challenged judicial district in the nine targeted counties is coextensive with one county. The 72nd district is composed of two counties. Id. § 24.174 (Vernon 1988). Since 1907 district judges have been elected county-wide. In 1985, however, a section was added to article V of the 1876 Constitution which specifically allows the creation of judicial districts smaller than a county. Tex. Const. art. V, § 7a(i) (1985). A majority of the voters in the county must authorize the division. Id. This power has yet to be exercised.[11]

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[11] The only time a district has been drawn smaller than a county was when the legislature divided both Dallas and Bexar counties into two districts, each district having jurisdiction throughout the whole county. The judge for each district was elected by the voters in the

The district courts in multi-district counties were unified for certain administrative purposes in 1939 through the passage of the Special Practice Act, which is now, for the most part, found in Tex. R. Civ. P. 330 (e)-(i). Guittard, supra at 457-58. The relevant parts of the Special Practice Act essentially provide that cases can be freely transferred between judges and that any judge can work on any part of a case including preliminary matters. Also, "[a]ny judgment rendered or action taken by any judge in any of said courts in the county shall be valid and binding." Tex. R. Civ. P. 330 (h).

The Administrative Judicial Act, originally passed in 1927 and subsequently amended on several occasions, divides Texas into nine administrative regions, each with a presiding judge appointed by the governor with the advice

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district in accordance with the constitution's command, Tex. Const. art. V, § 7 (1876, amended 1985), as opposed to being elected by county-wide vote as now. Thus, we cannot say that there is *no* precedent for dividing counties into geographically distinct districts. We can say that the state experimented with 2 of its 25 counties but abandoned the idea nearly a century ago. The statutes dividing Bexar and Dallas Counties into two districts were repealed in 1895 and 1907, respectively.

and consent of the senate. See Tex. Gov't Code §§ 74.005, .042 (Vernon 1988). The "presiding administrative judge is the key administrative officer in the Texas judicial system." Guittard, supra at 459. He is empowered to assign judges as necessary within his region. Id. §§ 74.052-056 (Vernon 1988 & Supp. 1990); see also Judicial Administration Rule 8 (Vernon 1988 & Supp. 1990). He is required to call two meetings of all judges in his administrative region each year and any other meetings as necessary. Tex. Gov't Code § 74.048(a) (Vernon 1988); Judicial Administration Rule 4 (Vernon 1988 & Supp. 1990). This conference is for "consultation and counseling concerning the state of the civil and criminal business" and is empowered to promulgate administrative rules, rules governing the order of trials and county-wide recordkeeping, and other rules deemed necessary. Tex. Gov't Code § 74.048(b)-(c) (Vernon 1988).

The local administrative judge is elected by a majority vote of all the judges in the county, including both district

and statutory judges. Id. § 74.091 (Vernon 1988 & Supp. 1990). His duties on the county level are similar to those of the presiding administrative judge. See id. § 74.092. The local administrative judge has the power to assign judges within his county. Id. § 74.094. Under the leadership of the local administrative judge, the district and statutory judges in each county are directed to adopt local rules of administration. Id. § 74.093. These rules must provide for, among other things, the "assignment, docketing, transfer, and hearing of all cases" and "fair and equitable division of caseloads." Id. § 74.094(b)); see also Judicial Administration Rule 9(b) (Vernon 1988 & Supp. 1990). All local rules, of course, must be consistent with state and regional rules. Judicial Administration rule 10 (Vernon 1988). In this regard, the present Chief Justice of Texas testified at trial that the only collegial decision-making by district judges in a county is in the handling of some administrative matters.

B.

A distinction was drawn between multi-member and single-member structures in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986). In that case the plaintiffs contested a primary run-off law, contending that it violated the Equal Protection Clause and the Voting Rights Act. The Second Circuit noted that one of the ways that a class of citizens may have less opportunity to participate is when there are electoral arrangements that diminish a class's opportunity to elect representatives in proportion to its numbers. The court distinguished, however, between multi-member bodies, where at-large elections may produce this result, and elections for single-member offices. *Butts*, 779 F.2d at 148. The court found that the Supreme Court had made this distinction implicit in *City of Port Arthur v. United States*, 459 U.S. 159 (1982), where the Supreme Court struck down a run-off requirement for seats on a multi-member city

council, but did not mention the run-off requirement for mayor. The Eleventh Circuit followed *Butts* in *United States v. Dallas County, Ala.*, 850 F.2d 1430 (11th Cir. 1988), in holding that "the at-large election of the probate judge is permissible under the Voting Rights Act with respect to the judicial aspects of that office." Id. at 1432 n.1.

The positions at issue in *Butts* and *Dallas County*, and the position not considered in *Port Arthur*, were what can be viewed as traditional single member offices, i.e., mayor, city council president, single probate judge, or comptroller. There was only one of each office in a given geographical area, and no problem with overlapping jurisdictions. Here, there are many judges with overlapping jurisdictions. Nonetheless, each acts alone in wielding judicial power, and once cases are assigned there is no overlap in decision-making.

Indeed there are special courts created within some judicial districts that emphasize the single-member nature of

the offices, for not all of the judges handle the same type of work. Some are courts of general jurisdiction, but some judges are elected specifically to handle juvenile cases, or family law cases, or criminal cases. To that extent they are separate office, just as county treasurer and sheriff are different positions. Of course, many of the judges do handle the same type of cases and the cases are assigned to any of these judges within a given geographical jurisdiction. There are many of them within a geographical area, and the plaintiffs would find this dispositive. A United States district court in Alabama has held that Alabama trial courts similar to the Texas courts are multi-member positions.[12] *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511

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[12] The district court in *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), also held that the at-large system of electing trial judges in Louisiana impermissibly diluted black voting strength, assuming that districts with more than one judicial position were multi-member districts. In *Haith v. Martin*, 618 F. Supp. 410 (D.C.N.C. 1985), aff'd mem., 106 S.Ct. 3268 (1986), the district court referred to the superior court judges in North Carolina, also trial judges, as "designated seats in multi-member districts." Id. at 414. The issue there was not a violation of Section 2, however, but whether Section 5 of the Act applied to such judicial elections, requiring preclearance of changes.

(M.D. Ala. 1989). The court considered *Dallas County* and *Butts*, but concluded that

> Although neither court expressly defined the term "single-member office," it is clear to this court that the phrase, as used in those cases, refers to a situation where under no circumstances will there ever be more than one such position in a particular geographic voting area.

Siegelman, 714 F. Supp. at 518.

The Court found that exclusive authority alone does not define single-member official. Id. We disagree with this view of multi-member versus single-member office and agree with the argument made by defendants in *Siegelman* that

> the hallmark of a single member office, as [the Butts and Dillard] courts use the term, is not the fact that the office is traditionally held by only one individual but, more importantly, the fact that the full authority of that office is exercised exclusively by one individual.

714 F. Supp. at 518.

Viewing district judges as members of a multi-member body is flawed in concept. Before any suits are filed, before any cases are assigned, there is a group of judges with concurrent jurisdiction, and plaintiffs maintain that this group

should have minority members, so that minorities' views and concerns are considered by the judges who decide important issues in their lives. The problem is that once a case is assigned, it is decided by only one judge. The other judges have absolutely no say over the disposition of that case, and no influence over the deciding judge. One commentator has described the Texas system as a "one-judge, one court organization at the trial level, with rigid jurisdictional lines and with each judge largely independent of any supervisory control, except by way of appellate review." Guittard, Court Reform Texas Style, 21 Sw. L.J. at 455.

C.

It is implicit in *Gingles* that the effect of election practices must be considered after taking the underlying definition of the offices of state government as given. Even the sharply divided Gingles Court agreed that its inquiries were only into the legality of at-large methods of electing representatives to a larger governing body. Section 2 does

not grant federal courts the authority to disregard the states' basic arrangements. We would not rest on inference to support such a grant of authority. It would run counter to fundamental concepts of federalism:

> As broad as the congressional enforcement power is [under the fifteenth amendment], it is not unlimited. Specifically, . . . the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.

Oregon v. Mitchell, 400 U.S. 112, 128 (1970).

The State of Texas has chosen to have trial judges who wield full judicial authority alone, a structure we must accept. Subdistricting would not create an equal opportunity for representation in decision-making, for

> [t]here can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

Butts, 779 F.2d at 148. What subdistricting does, rather

than provide minorities with representation in all decisions, is to simply allocate judges, and thus judicial decisions, among various population groups. The Voting Rights Act does not authorize such allocation. It cannot be made to authorize allocating judges by simply restating the office of district judge as a shared office or by asserting that the "function" of an office is not relevant. Saying that district judges in fact share a common office that can be subdistricted does not make it so. Nor does the assertion that function is not relevant make sense. Function is relevant to the threshold question of what features of the state arrangement define the office.

These judges all hear and decide their own docket of cases, and their character as single-office holders instead of members of a multi-member body is emphasized by the problems inherent in attempting to break the linkage of jurisdiction and elective base. To do so may well lessen minority influence instead of increase it, surely not what

Congress intended when it enacted the Voting Rights Act or its amendments. The current system of electing district judges at least permits voters to vote for each and every judicial position within a given district, generally a county. It is more likely, therefore, that minority voters will have some influence on the election of each judge. Under the district court's order, each voter would have the opportunity to vote for only one judge in each district, the judge whose position was assigned to the subdivision. At the same time, a minority litigant will be assigned at random to appear before any district judge in the county. Under the district court's orders it is much more likely than not that a minority litigant will be assigned to appear before a judge who is not elected from a voting district with greater than 50% minority population. Instead, the great majority of district judges will be elected from new voting subdistricts with negligible minority populations and, consequently, negligible minority political influence on the outcome of those elections. Under

the new order requiring election of judges from subdistricts, 9 of the 59 judicial positions in Harris county would be elected from minority-dominated subdivisions. Minority voters would have very little influence over the election of the other 50 judges, for the minority population is concentrated in those 9 subdivisions. When minority members are litigants, however, they would not necessarily appear before one of the judges elected from a minority-dominated subdivision. Instead, a minority member would have an 84.75% chance of appearing before a judge who has little direct political interest in being responsive to minority concerns.[13] The minority member would have a 98.3% chance of appearing before a judge in whose election he had not been able to vote. This is not like the situation in *Chisom*, where the judges were all part of one body, and every case that went to the Louisiana Supreme Court was

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[13] Moreover, cases without minority parties, but nonetheless concerning issues important to minority groups, would have an 84.75% chance of being assigned to a judge with no accountability to minorities living in the county.

heard by all of the judges, so every individual litigant from the state of Louisiana was assured that a judge for whom he had an opportunity to vote would hear his case.

Requiring subdistricting for purposes of electing district judges, unlike other offices, would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not fact of its judicial independence--a core element of a judicial office. Trial judges would still exercise their full authority alone, but that authority would no longer come from the entire electorate within their jurisdictional area. Subdistricting would result in decisions being made for the county as a whole by judges representing only a small fraction of the electorate. This does not occur when members of larger bodies are elected from subdistricts, for when the body makes a decision, the interests of all electors are still represented in each decision. When the decisions are not made by a group, the nature of the decision-making

body as representative of all of the electors is fundamentally changed through subdistricting. The State of Texas has struck for the essential and defining quality of independence by defining the office of trial judge as a person who judges singly and whose power is derived from an electoral base equal to jurisdictional base. Trial judges are not members of a multi-member body, although there are many district judges, for the district judges do not decide cases as a body. Disregarding the state's insisted linkage of elective base and jurisdiction for single office holders by subdistricting or ignoring their discrete activity, causes a fundamental change in the very office of district judge, a result not contemplated by the Voting Rights Act. These elements define the office; they are far more than the "manner" of election.

One can view the single-official doctrine as being no more than a statement of the mechanical impossibility of gaining greater representation for minorities. This approach is simply a resignation to the reality that if there is only one

official, there can only be an at-large election. A second view is that the single official exception expresses far more. This view recognizes that we must accept the state's definition of the office, and that where functions are singly exercised, providing single-member districts is no more than proportional representation in its most superficial form.

Some district courts have proceeded with the first view, concluding that the single official doctrine is inapplicable where more than one official was elected at-large by the same electorate. It is plain that this entire suit rests upon the premise that the single official exception reflects no more than the reality that there is nothing to divide unless there is more than one judge in a single county. It is no accident that this suit attacks only the nine counties with multiple district judges and minority populations. But, the right secured to minorities under Section 2 of the Voting Rights Act to not have their vote diluted is expressed in the assertion that their interests are to be represented in

governmental decisions. Where judges make their decisions alone, electing judges from single member districts only increases the likelihood that a small number of governmental decisions will be influenced by minority interests, while minority interests will not be represented at all in the majority of judicial decisions. In this way subdistricting would work a fundamental change in the scheme of self governance chosen by the state of Texas, for it would change the authority behind the decisionmaking body of the Texas courts--and in doing so it would retard, not advance the goals of the Voting Rights Act.

In sum, the single-official concept as we apply it here, whatever its full import in other contexts, is no more than a specific application of the basic principle that analysis under the Voting Rights Act proceeds without changing the state's definition of the office. With the judges acting alone, each judge the decision-making body, a coterminous electoral and jurisdictional base is a core component of the office.

Subdistricting would change that office in ways wholly different from changing the selection of members of a governing body as distinguished from the body itself.

D.

Plaintiffs argue that the state's interest in linking jurisdiction and elective base is weakened because in 1985 Texas granted authority to counties to provide for the election of district judges from smaller geographical units. There are two difficulties with this argument. First, no county has elected to do so, and, second, the change only allows the creation of districts smaller than a county. It does not purport to authorize the election of district judges with countywide jurisdiction from districts smaller than the county.

It is also suggested that there is no unacceptable appearance of bias (translate, you still have a court of law) in the prosecution of claims where one litigant is a constituent of a district judge and the other is not. The

argument continues that such a circumstance is presented where one of the parties is from another county. This suggestion ignores the fact that the state recognized that elimination of this risk and appearance of bias was essential to the office it was creating by an elaborate set of rules controlling venue. Indeed, Texas has perhaps the most developed venue practice of any of the states, doubtlessly attributable to its diversity and size, allowing a mini-trial of venue facts. Whether a trial proceeds in the plaintiff's home county in El Paso or a defendant's home county in Dallas is of great moment. In sum, the intercounty bias argument proves, rather than defeats, the point. Avoiding the fact and appearance of bias is a powerful state interest. There is no corresponding system of venue rules for a subdistricted county. Rather, as we explained, the state insists on linking the elective and jurisdictional base. Texas wants a trial *judge*, not a partisan. We are persuaded that Texas has a compelling interest in linking jurisdiction and elective base

for judges acting alone. By definition there can be no dilution from the county-wide election of such single officials.

JOHNSON, Circuit Judge, dissenting:

Introduction

Let it be clear at the outset: this case presents compelling allegations of *racial discrimination* brought under the United States Voting Rights Act by black and Hispanic minorities. Congress intended the Voting Rights Act to be a key measure in its efforts to erase a haunting legacy of racial discrimination in the United States. The majority and concurring opinions in this case, in reasoning inconsistent with this Court's long history of progressive and enlightened interpretation of civil rights legislation,[1] seriously cripple this congressional intent. Despite unmistakable congressional statements concerning the broad scope of the Voting Rights

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[1] This Court's history of courageous efforts to end racial discrimination in the South are well know. *See* J. Bass, *Unlikely Heroes* (1981). For instance, in 1973 this Court handed down a landmark Voting Rights Act decision, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam), which established an enlightened set of standards to be applied under the Voting Rights Act's "totality of the circumstances" test. The Supreme Court later cited *Zimmer* as the authoritative exposition of these standards. *See Thornburg v. Gingles*, 478 U.S. 30, 36 n.4 (1986).

Act, the majority and concurring opinions have taken different directions to achieve the same result: they deny minority groups the right to challenge discriminatory practices in judicial elections.

The majority opinion is completely isolated. No previous court has ever even suggested that judicial elections might be exempt from the reach of Section 2 of the Voting Rights Act. To the contrary, this Court, the United States Court of Appeals for the Fifth Circuit, had earlier concluded that Section 2 applied to *all* elections, including judicial elections. Not only does the majority opinion reverse this two year old precedent, but it also demonstrates a shocking lack of concern for the urgently argued position of the Attorney General, who has consistently maintained that the Voting Rights Act reaches *all* elections. The majority's isolated opinion stands as a burning scar on the flesh of the Voting Rights Act; the majority opinion is not simply wrong, it is dangerous.

Judge Higginbotham's concurring opinion ("the concurrence") is scarcely removed from the majority opinion. Like the majority opinion, the concurrence is wholly inconsistent with the reasoned decisions of numerous courts and the established position of the Attorney General. The concurrence purports to rely upon compelling precedent from another federal court. But in truth, the concurrence is entirely premised upon a single case that is *not* authority for the concurring opinion's eccentric holding. The scar the concurrence would leave on the Voting Rights Act is no less injurious than that the majority inflicts; the concurrence is not only wrong, it too is dangerous.

Several truths are self-evident from the clear language of the statute that had heretofore opened the electoral process to people of all colors. The Voting Rights Act focuses on the *voter*, not the elected official. The Act was intended to prohibit racial discrimination in *all* voting, the sole inquiry being whether the political processes are equally open to all

persons, no matter their race or color. The Act is concerned only with the intent of persons of "race or color" in casting a ballot; it has no interest in the function of the person holding the office. Yet, the majority and concurring judges carve out a sweeping exception to the Act's intended scope, concluding that the Voting Rights Act does not apply to judicial elections (or at least some judicial elections). I refuse to join my fellow judges' purposeful and calculated deprivation of the Voting Rights Act's ability to eliminate racial discrimination in the electoral process.

I.

THE MAJORITY OPINION

In 1988 this Court handed down its decision in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom. Roemer v. Chisom*, 109 S. Ct. 390 (1988), which held that Section 2 of the Voting Rights Act applies to judicial elections. Today, in an opinion that mutilates familiar

precepts of statutory construction,[2] the majority rudely abandons the *Chisom* precedent.[3] The majority, concluding

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[2] Purporting to *apply the text of the statute*, Majority Opinion at 23 n.14, the majority essentially concludes that the term "representative" in Section 2 of the Voting Rights Act is synonymous with the term "legislator." To the contrary, the majority is not applying the text of the statute, but rather it is applying its own novel definition of an isolated term appearing on one single occasion in the statute. Be that as it may, the majority still should never have reached the point of *literally applying the text of the statute*. In this Circuit, it is established law that "literal statutory construction is inappropriate if it would produce a result in conflict with the legislative purpose clearly manifested in an entire statute or statutory scheme or with clear legislative history." *Almendariz v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985). Conveniently, the majority opinion ignored this established law, probably because it knew that its "literal" definition of "representative" was inconsistent with other language in the Voting Rights Act and the legislative history of the Act.

[3] On May 27, 1988, a panel of this Court denied a Petition for Rehearing and for Rehearing En Banc in *Chisom v. Edwards* because "*no* member of this panel nor *Judge in regular active service on the Court ... requested that the Court be polled on rehearing en banc.*" (emphasis added). Despite the denial of rehearing in *Chisom* concerning the applicability of Section 2 of the Voting Rights Act to judicial elections, the majority now utilizes the grant of en banc consideration in the instant case to reconsider *Chisom*. Such action, while certainly not prohibited, offends the familiar principle of stare decisis. It cannot be stated too adamantly: the majority of this Court is reconsidering a decision on which, just barely two years go, no member of the Court even suggested holding the mandate in order to explore the possibility of a need to reconsider the case en banc.

The capricious path the instant case was forced to take to accomplish the rejection of *Chisom v. Edwards* is revealing. As late as January 11, 1990, just as a special session of the Texas legislature was convened, a panel of this Court, two members of which are now aligned with the majority position, entered an order staying the judgment of the district court in the instant case. The express intent of this order was to afford the legislature a reasonable time to address the issues presented in

that the Act does not apply to *any* judicial election, delivers a devastating blow to the Act's continuing ability to eliminate racial discrimination in voting. At this stage, there is little reason to revisit in detail Judge Higginbotham's refutation of

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the federal district court's decision. In part, it recited:

IT IS ORDERED that appellants' motion for stay pending appeal are [sic] GRANTED. We do so in order that the State of Texas may be allowed a reasonable opportunity to address the problem presented by the holding of the district court [in the instant case] entered November 8, 1989, that the state system of selecting judges is invalid as violating Section 2 of the Voting Rights Act. ...

That holding, if sustained on appeal, will require an organic and wholesale review and reconstitution of the Texas judicial selection system, a task which should be addressed and carried out by the state's elected representatives, rather than by the federal courts. Only if it becomes apparent that the state is unwilling to act with measured and appropriate speed in this regard should our courts intervene. When the State has had a reasonable period within which to address the problem presented in a special session of the Legislature, the Court will entertain a motion to dissolve. That has not yet occurred; when it does, we will be amenable to a motion to dissolve the stay which we enter today.

League of United Latin American Citizens v. Clements, No. 90-8014 (5th Cir. Jan. 11, 1990) (unpublished). The stay order, which cited *Chisom* and presumed the validity of *Chisom*, remained in effect until March 28, 1990, when it was dissolved by the panel which originally heard the instant case. That same day, the members of this Court voted to hear the case en banc on an expedited schedule. The panel opinion here was rendered on May 11, 1990, and the en banc Court heard oral arguments on June 19, 1990.

The presumption of this Court as late as January 11, 1990, concerning the validity of *Chisom* and its inescapable holding that the Voting Rights Act applies to all judicial elections was obliterated like parched grass in the face of a late summer prairie fire. The fire is beyond reason or control as it races across the prairie--yet its cause is unknown.

the majority's attack on *Chisom v. Edwards*. It is sufficient simply to reiterate a few essential--and well established--points.

Congress enacted the Voting Rights Act in 1965 "to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Since the inception of the Act, the Supreme Court has consistently interpreted the Act in a manner which affords it "the broadest possible scope" in combatting racial discrimination. *Allen v. State Board of Elections*, 393 U.S. 544, 567 (1969). Other courts, including this Court, have followed the Supreme Court's lead. *See, e.g., Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam). As a consequence, the Voting Rights Act regulates a wide range of voting practices and procedures. *See United States v. Board of Commissioners*, 435 U.S. 110, 122-23 (1978).

For a resolution of the instant case, it is unnecessary to look beyond Section 14(c)(1) of the Voting Rights Act, which defines the salient word "voting" and describes the range of election practices that are encompassed within the regulatory sphere of the Act:

> The terms "vote" or "voting" shall include *all* action necessary to make a vote effective in *any* primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to *candidates for public or party office* and propositions for which votes are received in an election.

42 U.S.C. § 19731 (1982) (emphasis added). Can this language in the Act itself be ignored? It is indisputable that Texas' elected judges are "candidates for public or party office." Thus, by its express terms, the Voting Rights Act applies to state judicial elections. Indeed, this is the only result consistent with the plain language of the Act.

Nonetheless, relying on a restrictive definition of the single word "representative" in Section 2 of the Act, the

majority determines that the Voting Rights Act does not necessarily apply to all "candidates for public or party office." Such a conclusion breaches several established canons of statutory construction. The majority's restrictive definition of "representative" violates the requirement that remedial legislation such as the Voting Rights Act be broadly construed. *See Allen*, 393 U.S. at 565. The majority's reliance on an isolated term violates the requirement that a reviewing court examine a statute in its entirety. *See Duke v. University of Texas at El Paso*, 663 F.2d 522, 525 (1981), *cert. denied*, 469 U.S. 922 (1984).

Moreover, the majority's awkward decision violates the requirement that a reviewing court avoid statutory interpretations that lead to an absurd or inconsistent result. *See United States v. Turkette*, 452 U.S. 576, 580 (1981). As just one example of the majority opinion's troubled logic, consider the majority's crude attempt to distinguish judges from other elected officials. The majority repeatedly urges

that judges are not "representatives" within the comprehension of the Voting Rights Act because judges are not *advocates*; that is, judges "speak for and to the *entire* community, never for segments of it and still less for particular individuals." Majority Opinion at 19 (emphasis in original). Yet, at the same time, the majority recognizes that this Court has already found that many other elected officials are "representatives," officials who also cannot fairly be described as advocates for segments of the community or particular individuals. Majority Opinion at 23 n.14. A county sheriff or court clerk, for example, speaks for and to the entire community--is responsible for and to the entire community. If a county sheriff or court clerk, as with a judge, attempted to act in a partisan manner, that person would be grossly deficient in his or her duties.

It should be clear by this point that the majority's decision is less an attempt to interpret congressional intent concerning the reach of the Voting Rights Act, and more an

attempt to effectuate the majority's policy determination that state judicial elections should be immune from federal congressional interference. Perhaps the strongest evidence of the majority's desire to supplant the stated aims of Congress with its own policy preferences is its conspicuously casual treatment of the position of the United States Attorney General. In *United States v. Board of Commissioners*, 435 U.S. at 131, the Supreme Court concluded that the Attorney General's interpretation of the Voting Rights Act is persuasive evidence of the original congressional understanding of the Act, "especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." Id. In the present case, the Attorney General has filed an amicus curiae brief which maintains that the scope of Section 2 of the Voting Rights Act reaches *all elections, including judicial elections*. But remarkably, the majority dismisses the Attorney General's position, noting simply that it does not seem to

"weigh very heavily in the scales." Majority Opinion at 23.

The application of Section 2 should depend *solely* on the fact of nomination or election. As the Eleventh Circuit has--a Circuit which shares this Court's long tradition of enlightened enforcement of federal civil rights legislation--has noted, "[n]owhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 *on the function performed by an elected official*." *Dillard v. Crenshaw County*, 831 F.2d 246, 250-51 (11th Cir. 1987) (emphasis added). By exempting an entire class of elected officials from Section 2 simply on the basis of their judicial *function*, the majority has not only inextricably placed this Court at odds with the conclusions of other circuits, but also has struck a devastating blow to the Voting Rights Act's ability to alleviate racial discrimination in the voting process.

II.

THE CONCURRENCE

Judge Higginbotham's concurring opinion concludes, and I agree, that the Voting Rights Act applies to judicial elections. The concurrence, however, is itself seriously flawed. Critical examination of the concurring opinion's construction of the single office holder exception reveals the error:[4] the concurrence's creative interpretation of the Voting Rights Act would result in the *per se* exclusion from the reach of the Voting Rights Act of elections for the greatest part of the judiciary--state district court judges. In a troubling display of judicial intervention, the concurrence's result-oriented opinion fails even to acknowledge the clear purpose of the Act evidenced in its language and legislative history.

In adopting the Civil War amendments, Congress was propelled by a concern for the emasculation of minority voting strength through the puissant coupling of bigotry with

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[4] The concurrence asserts that there can be no dilution of minority voting strength where the elected official acts independently, regardless of whether there are one or one hundred such official posts in the relevant district.

state supported election practices.[5] Similarly, a century later, Congress enacted the Voting Rights Act for the broad purpose of eradicating racial discrimination in voting across the length and breadth of this nation.[6] In 1982 amendments to the Act, Congress strengthened the Act's promise to ensure minorities equal access to the political process. The Senate Report accompanying the 1982 amendments indicates that the Voting Rights Act was designed not only to correct active discrimination, but to "deal with the accumulation of discrimination." Senate Report Accompanying the 1982 Amendments to the Voting Rights Act at 5. Especially in light of the history and language of the Act, it is axiomatic that the relevant inquiry centers on the *voter*--specifically, the minority voter--*not* on the elected official. The Act is, after all, the *Voting Rights* Act.

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[5] *See* Concurring Opinion at 24.

[6] President Ford's poignant words are as powerful today, fifteen years later: "the right to vote is the very foundation of our American system, and nothing must interfere with this very precious right." President Gerald Ford, Remarks Upon Signing A Bill Extending the Voting Rights Act of 1965 (August 6, 1975).

Section 2 and the Judiciary

The majority opinion concludes that state district court judges are not "representatives" within the comprehension of Section 2 of the Voting Rights Act. However, as the concurrence aptly notes, the term "representatives" in Section 2 is not synonymous with "legislator." Congress intended the Voting Rights Act to prohibit and alleviate discrimination in *all* voting, a term which Congress defined to include any action necessary to make a vote effective in any election with respect to *any candidate* for public or party office.[7] From the language of the Act *as a whole*, it is clear

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[7] The United States Attorneys General, in an unbroken chain, have consistently interpreted the Voting Rights Act broadly, and, more recently, have interpreted Section 2 to reach elected judges. At the time the original Voting Rights Act was passed in 1965, the Attorney General stated that "*every election* in which registered voters are permitted to vote would be covered." *Voting Rights: Hearing Before Subcommittee No. 5 of the House Judiciary Committee*, 89th Cong. 1st Sess. 21 (1965) (emphasis added). In both Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom.* Roemer v. Chisom, 109 S. Ct. 390 (1988), and in the instant case, the Attorney General filed an amicus brief in which he maintains that the scope of Section 2 reaches all elections, including judicial elections.
Additionally, in a recent Section 5 preclearance review, the Assistant Attorney General denied preclearance of a proposed majority vote, designated post, at-large method of judicial elections in Georgia similar to that under attack in the instant case, concluding in part:

that the term "representative" corresponds with the term "candidate." It is also clear that a contestant in a judicial election is a candidate for public office. Thus, the language and reasoning of the concurring opinion is sound to the limited extent it urges that neither the words nor the legislative history of the Act indicate any intention on the part of Congress to exempt judicial elections from coverage.

This Court has previously addressed the question of the Act's application to judicial elections. In *Chisom v. Edwards*, a case which examined the application of Section 2 in the context of a challenge to Louisiana's system of electing state supreme court justices, a panel of this Court

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Our review of a broad range of evidence in this regard indicates that polarized voting generally prevails in all of the superior court circuits now under review and there is a consistent lack of minority electoral success in at-large elections. Thus, it appears that, in the totality of the circumstances, black voters in these circuits have a limited opportunity to elect their preferred candidates....

> In addition, the state has not shown how its interests are served by circuitwide elections in many of the circuits now at issue where the at-large election feature is in apparent violation of Section 2 of the Voting Rights Act.

Letter from Assistant Attorney General John R. Dunne to Georgia Attorney General Michael J. Bowers (Apr. 25, 1990).

held that Section 2 applies with equal force to judicial elections. As in the concurring opinion in the instant case, the outcome in *Chisom* hinged upon an examination of both the plain language and the legislative history of the Act.

Despite a basic agreement with this Court's earlier analysis in *Chisom*, the concurrence here attempts to shift the focus of the Voting Rights Act from the minority voter to the elected official. This Court recognized in *Chisom* that the term "representative" for purposes of the Voting Rights Act may be defined as *anyone* selected by popular election from a field of candidates to fill an office.[8] The definition of "representative" in *Chisom* intertwines with the statute's definitions of "vote" and "voting" and assures the Act's application to *all* elections. The concurrence in the present case, however, subtly constricts this definition. While acknowledging that Congress used the terms "candidate" and "representative" interchangeably when drafting the Act, the

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[8] *Chisom*, 839 F.2d at 1060.

concurrence defines "representative," at least within the narrow confines of Texas elections for district judges, as "one who is chosen to be responsive to the people and to represent their interests in decisions." Concurring Opinion at 7. The concurrence's definition attempts to precipitously limit the scope of the Act's remedial provisions, emphasizing the position of the office-holder over the status of the voter. The anticipated responsive nature of a particular office (or office holder) is of absolutely no consequence to the initial and dispositive question of whether the office is filled through the use of an electoral process.[9] Nonetheless, the

[9] It is true that one of the Senate Report factors that may be probative in a vote dilution case to establish a Section 2(b) violation is "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S. Rep. at 29. However, the Senate Report emphasizes that "[u]nresponsiveness is not an essential part of plaintiff's case." *Id.* at n.116. In fact, in *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), a case involving a vote dilution challenge to the use of multi-member districts and at-large voting to elect Louisiana district court, family court, and court of appeals judges, the district court remarked that the element of responsive representation simply is not a consideration in a judicial election case:

> The Senate Report...also suggested that lack of responsiveness on the part of elected officials to the particularized need of the members of the minority group might be factor in some cases. ... That obviously is not a factor in this case since the only response which a member of the judiciary may make is to rule on all matters fairly and impartially, without favoring or being prejudiced against any group.

Id. at 301. Consequently, while a state's interest in retaining a system which exudes an appearance of impartiality may be considered among the totality of the circumstances, the converse, actual responsiveness, should not be relevant to a claim of vote dilution in the context of a judicial election.

concurrence's definition is necessary to its "single official" argument--which is based in part on an examination of the duties and functions performed by a trial judge once he or she is in office--and the argument that the State has a compelling interest in retaining the current system.

The Minority Voter

Despite Congress' clear statement that the Voting Rights Act applies to *all* voting, the concurrence, through rhetoric surrounding the term "representative," attempts to shift attention from the one casting a vote to the one for whom the vote is cast. Not one word or thought contained in Section 2(a) or (b) supports, or is suggested by the concurrence in support, of this effort. The Voting Rights

Act was designed to eradicate discrimination in voting, and the essential inquiry is whether the political processes leading to the casting of the ballot are equally open to all persons, no matter what their race or color.

Nothing in the language of Section 2 suggests that a reviewing court should concentrate on the type of election under dispute--whether it is for a mayor, an alderman, a legislator, a constable, a judge or any other kind of elected official.[10] Rather, the sole focus of Section 2 is the minority

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[10] Section 2, as amended in 1982, now provides:

(a) No voting qualification or prerequisite to voting or standard practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

voter--specifically, whether the minority voter has been allowed the opportunity to participate fully in the democratic process.

> Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official. ... Once a post is open to the electorate, ... if it is shown that the context of that election creates a discriminatory but corrigible election practice, it must be open in a way that allows racial groups to participate equally.

Dillard v. Crenshaw County, 831 F.2d 246, 250-51 (11th Cir. 1987).[11]

The instant case reveals an electoral scheme which is "discriminatory but corrigible." Whenever a number of officials with similar functions are elected from within a discrete geographic area, there exists the inherent potential for vote dilution. The concurrence, however, ignores this verifiable fact, and concludes that, because the full authority of the *elected position* is exercised exclusively by one

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[11] This Court, in *Chisom*, stressed the soundness of the *Dillard* court's reasoning. *Chisom*, 839 F.2d at 1060.

individual, there can be no impermissible dilution of the *minority vote*.

The Voting Rights Act is not concerned with the power and authority vested in the elected office. It is the value and efficacy of the political process accorded the *voter*, not the office holder, which is secured by statute. The Supreme Court's decision in *Thornburg v. Gingles*[12] stressed Congressional concern over the submergence of minority votes as a result of significant white bloc voting. The express language of Section 2(b), which looks only to the "political processes leading to nomination or election" and to whether minority members "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," emphasizes this Congressional concern on the *voter* and not the elected official. Congress focused in Section 2 on the elimination of discrimination in *voting* (thus the title of the

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[12] 478 U.S. 30 (1986).

Act), and on the creation of minority opportunities for electoral success. *See Gingles*, 478 U.S. 30, 48 (1986); *Haith v. Martin*, 618 F. Supp. 410, 413 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) (the Act applies "to all *voting* without any limitation as to who, or what, is the object of the vote") (emphasis in original).

The concurrence asserts that the essential right secured to minorities under Section 2 is the right to have "their interests...represented in governmental decisions." Concurring Opinion at 45. In this way, the concurrence bolsters its argument that creating smaller districts in multi-seat counties would create a perverse result by lessening "minority influence" over the decisions reached in lawsuits. Going further afield, the concurrence expresses concerned that under a system such as that authorized in the district court's interim plan, there is a high probability that a minority voter appearing in court will have his or her case heard by a judge whom he or she had no hand in electing.

The concurrence's discussion approaches the perceived problem from the wrong end;[13] again, quite simply, the focus should be on the rights of the *voter*, not the litigant. The essential inquiry is whether the minority *vote* is diluted--whether minority citizens have an equal chance of electing candidates of their choice. As the concurrence acknowledges, the standard is whether the political processes are equally open to participation. The focus of the 1982 legislative history of the Act, the 1985 amendment, and *Gingles* is on electoral opportunities and success.

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[13] Congress has acknowledged that, depending on whether the right or the wrong question is posed, courts may reach a conclusion which is totally anathema to the intent of the legislature. *See, e.g.*, S. Rep. at 28 (discussing the "wrong test" imposed by the intent test). The concurring opinion's rear-ended approach can best be illustrated through the use of another question: Does the Act guarantee that minority interests are represented or that minorities have access to the political process? While it is undoubtedly presumed that an elected official will represent the desires of the voters, the Voting Rights Act does not speak to such a presumption. While it may seem that the two questions are simply different sides of the same coin, the distinction is one which the legislature has contemplated. If the concurrence's statement that the "right secured to minorities under Section 2 of the Voting Rights Act to not have their vote diluted is expressed in the assertion that their interests are to be represented in governmental decisions" were correct, this would lead to the absurd conclusion that a plaintiff could, pursuant to the Voting Rights Act, bring to task an elected official who has not, during his tenure in office, given proper deference to minority interests.

The concurrence refuses to acknowledge the preeminence, within the context of the Voting Rights Act, of the efficacy of the minority vote. The concurrence notes that, because all registered voters in the county vote for all the judges, "minority voters have some influence on the election of each judge." Concurring Opinion at 42. This statement entirely avoids the issue: the instant case is before this Court because minority voters have asserted and proven that any influence they may potentially have as a cohesive voice--whether as to the election of one judge or several--is submerged at the ballot box by white bloc voting.

Even more disturbing, however, is the concurrence's confusion of the minority *as voter* and the minority *as litigant*. This confusion is best illustrated by the concurrence's concern that, under a single member districting scheme such as that imposed by the federal district court's interim plan, "a minority member would have an 84.75% chance of appearing before a judge who has no

direct political interest in being responsive to minority concerns." *Id.* at 43. The right of minorities to an equal opportunity to elect the candidates of their choice encompasses more far-reaching effects than the statistical probability that a minority litigant will appear before a judge of like race or color.[14] Despite the progress achieved under federal and state civil rights statutes, minorities in this country are far from free of the lingering legacy of racial discrimination, even at the ballot box.

The Function of Function

When juxtaposed against the express language of the Act, a test which requires an examination of the function of the elected official is inherently suspect by virtue of its

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[14] Black and Hispanic judges serve as role models for other minority group members, who may not have envisioned a legal or judicial career as a real possibility in the past. In addition, minority electoral victories encourage other minority members to participate in the political process by voting and by running for office. Persistent minority defeat, on the other hand, leads to apathy among minority voters and a feeling of exclusion from the opportunity to join in the process of self-government. To assert that these interests are any less tangible because of the nature of the elected office is to pervert the very core of the Voting Rights Act.

obvious judicial invention. As one court has emphatically noted,

> [n]owhere in the 239 pages of the [Senate] Report is there any indication whatsoever that Congress intended the Voting Rights Act to apply to only particular types of elections. Rather, the entire Report indicates ... that the 1982 amendment was intended to effect an expansive application of the Act to state and local elections.

Southern Christian Leadership Conference v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989). The title or duties of an elected office are inconsequential to the fundamental question of whether, due to significant white bloc voting, the votes of a cohesive minority group are consistently submerged and rendered ineffectual to elect the minority's preferred candidate.

The concurrence opines that "[f]unction is relevant to the threshold question of what features of the state arrangement define the office." Concurring Opinion at 41. This statement in its broadest sense is undoubtedly true. In the context of the Voting Rights Act, however, the compelling question is at what point that function will be

examined. The Act's focus on the minority voter reinforces the proposition that the function of the elected official is only relevant to an examination of whether, under the totality of the circumstances, a Section 2 violation has been established, not whether Section 2 is applicable.

To focus primarily on the function of the official during the initial analysis of a Voting Rights Act claim is to ignore the essential inquiry of the Act: "whether, as a result of the *challenged practice or structure*, the fundamental right of minorities to elect candidates of their choice and to participate equally in the political process has been violated." Senate Report at 28 (emphasis added). The quoted language indicates that, contrary to the concurring opinion's assertions, a reviewing court is not bound to accept a state's governmental plan if that plan in fact results in the illegal submergence of minority votes.[15] If deference to the

[15] In fact, the concurrence concedes that "section 2, if a violation is found, can lead to the dismantling of an entire system of voting practices that may have been in place for many years." Concurring Opinion at 30.

function of an official were in fact required, courts would have been acting contrary to the law since the very origin of voting rights litigation. Surely the imposition of single member districts in a judicial context treads no more upon a state's electoral scheme than the now familiar court-ordered displacement of well-entrenched at-large election schemes for legislative bodies.[16]

Vote Dilution and Single-Member Offices

The concurrence, characterizing Texas district court judges as single officeholders,[17] concludes that no violation

[16] The concurrence repeatedly argues that affording the minority plaintiffs relief in the instant case would totally dismantle the trial-level judicial system which Texas has chosen to implement. The torch has already destroyed this straw man; as the concurrence has pointed out, Texas has structured its government such that elected trial judges often wield their power independently. Even if single member districting should be the remedy ultimately imposed in the instant case, this fundamental characterization would not be altered.

[17] A court reviewing a claim of vote dilution must look to the plaintiffs and whether their votes, although cast, are impotent. The plaintiffs' success depends on an adequate demonstration of vote dilution. This task may be impossible where there is only one office at issue in the relevant jurisdiction because the election of an official to such an office, with unique responsibilities over a discrete geographical area, is unlikely to have dilutive potential. In short, no divisible alternative can be made. In the instant case, however, several similar, if not identical, positions are sprinkled throughout a relevant geographic area, presenting the likely potential for vote dilution.

of Section 2(b) can be shown because "each judge holds a complete judicial office," and there can be no share of such a single-member office. Concurring Opinion at 33. This application of the so-called "single officeholder exception" is entirely without support.

The concurrence relies primarily on the Second Circuit's opinion in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), which examined New York's primary run-off election law. The contested New York law provided that if no candidate for mayor, city council president, or comptroller received more than forty percent of the vote in a party primary, then a run-off election is held between the two candidates receiving the most votes. The district court, concluding that the totality of the circumstances demonstrated

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The concurring opinion reaches the tenuous conclusion that Congress intended Section 2 to prohibit the discriminatory dilution of minority voting strength when minorities are attempting to elect appellate court judges, but that Section 2(b) can never reach the at-large elections of trial judges--regardless of whether one or one hundred judges are elected from the same district--because the latter officials decide controversies independently. There is no support for this contention in the words of the Act, in the legislative history of Section 2, nor in logic for this result-oriented contrivance.

a Section 2 violation, found in favor of the minority plaintiffs. The Second Circuit reversed, noting that

> [t]he concept of a class's impaired opportunity for equal representation [cannot be]...uncritically transfer[red] from the context of elections for multi-member bodies to that of elections for single-member offices....[T]here is no such thing as a "share" of a single-member office.

Butts, 779 F.2d at 148. The concurring opinion rests squarely--and solely--on this brief passage from *Butts*; examination of the particular facts in *Butts*, however, reveals that this passage provides absolutely no support for the concurrence.

In *Butts*, the voting district consisted of a municipality. From this voting district, three positions were filled by election. The three positions were the offices of (1) mayor, (2) city council president, and (3) comptroller. Concluding that it is impossible to capture a "share" of a single member office, the Second Circuit held that the contested electoral law did not trigger a vote dilution analysis and therefore

could not violate Section 2(b).[18] The instant case, on the other hand, involves the election of *multiple* judges to virtually identical positions in one geographic area, with each judge exercising autonomy over his or her particular office. The concurrence incorrectly extends *Butts*' reasoning to conclude that if minority groups are unable to elect their preferred candidate to these autonomous positions, the result is simply a consequence of the political process and not the

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[18] The *Butts* rule that a single-member office is not physically divisible has been implicitly rejected in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied sub nom. Duncan v. Carrollton*, 485 U.S. 936 (1988). In *Stallings*, plaintiffs challenged the one-person form of county commission government in Carroll County, Georgia, because it diluted minority voting strength and lessened the opportunity of black persons in the county to participate in the electoral process. This one-person system had been in effect since 1953. The Eleventh Circuit reversed the judgment in favor of the defendants, holding that the district court had applied the incorrect legal standard (in light of *Gingles*) by failing to give the proper weight to the two most important factors in a Section 2 vote dilution claim: (1) the extent to which minorities had been elected, and (2) the existence of racially polarized voting. *Id.* at 1555.
In its brief discussion of *Stallings*, the concurrence mischaracterizes the Eleventh Circuit's analysis, implying that the reversal turned only on the presence of evidence indicating a discriminatory intent. In fact, the Eleventh Circuit devoted most of its discussion to an analysis of the "effects" test of Section 2 and *Gingles*, and to the district court's findings as to whether the single-member scheme resulted in discriminatory vote dilution. The Eleventh Circuit reversed the district court's judgment based both on its treatment of the plaintiffs' constitutional challenge, and on its treatment of the Section 2 challenge as well.

result of vote dilution.

Butts stands for nothing more than the unremarkable proposition that in certain electoral situations, there exists only one relevant office for the whole electorate. In *Butts*, one of the offices at issue was the position of mayor. The Second Circuit reasoned that unlike the electorate which selects candidates to fill the legislature, the electorate which selects a candidate to fill the mayoralty cannot be subdivided into districts. In holding that a mayoral election cannot be the basis of a vote dilution claim, *Butts* thus focuses on the *electorate* and whether the *electorate* can be subdivided; it does *not* focus on the official and whether the official or his office can be subdivided.

On a cursory examination of the concurring opinion, its attempted expansion of the *Butts* rationale might seem plausible. This superficial plausibility, however, is what makes the concurring opinion so dangerous; it has the potential to seduce the unwary into an interpretation of the

Voting Rights Act that would frighteningly limit the applicability of the Act. The concurrence's understanding of the "single officeholder exception" is seriously flawed, and must not be allowed to do further damage.

In its broadest sense, the concurrence's conception of the "single officeholder exception" states absolutely nothing. *Every* officeholder is a single officeholder; *no* position is shared by more than one person. Every officeholder exercises complete authority over the duties of his or her office. To say that a district judge in Texas exercises full responsibility over his office simply does not advance the analysis. Every state legislator exercises full responsibility over his or her office; in that respect the legislator is no different from a judge. Every county sheriff exercises full responsibility over his or her office; in that respect the county sheriff is no different from a judge.

The problem with the concurrence's single officeholder analysis is that it misdirects the focus of the inquiry. The

question is not whether a *judge* can be subdivided, as the concurrence posits, but rather whether the *judiciary* can be subdivided, or more precisely, whether the electorate that selects the members of the judiciary can be fairly subdivided such that the votes of minority voters within the electorate are not submerged in a bloc of white votes. The focus must be on the electorate, and not on the individuals who are chosen by those voters.

Nonetheless, in an unprecedented example of judicial creativity, the concurrence attempts to expand the *Butts* rule by authorizing an examination of a trial court judge's role as a sole decisionmaker.[19] Such an expansion flies in the face

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[19] The concurrence heavily relies on its conclusion that the full authority of a trial judge's office is exercised exclusively by one individual. This conclusion is at odds with the true structure of the judicial system in Texas. For example, administrative matters are handled through a collegial decision-making process by the district judges within the county. Such matters include the election of a local administrative judge, the appointment of staff and support personnel, the adoption of local rules of administration, the adoption of local rules and the exercise of supervisory authority over the clerk's office. *See* Tex. Govt. Code Ann. § 74.091 *et seq.* (Vernon 1988). Furthermore, the judges, functioning together as a collegial body, are charged with the responsibility of selecting by majority vote a county auditor. *Id.* § 84.001 *et seq.* Moreover, the judges share authority over administration of the caseload. In Harris County, for example, fifty-nine district judges

of congressional intent that the Act liberally apply to all forms of voting. The concurrence does not do justice to the spirit of the Voting Rights Act by attempting to expand *Butts* to a situation in which several virtually identical positions are elected by the same electorate to serve the same geographic area.

Whether an office-holder wields his power in an individual or collegial manner is simply not the relevant inquiry. *Butts*, the case on which the concurrence hinges, was not based on a "collegial decisionmaking" rationale, nor was this concept even discussed. The *Butts* exception is premised simply on the number of officials being elected (one), the unique responsibilities of that office, and the

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have overlapping authority to handle the heavy caseload of the district. Similarly, jury selection, case assignment, and record retention are handled on a county-wide basis. Furthermore, cases can be freely transferred between judges and any judge can work on any part of a case including preliminary matters. One district judge may, therefore, find his or her hands tied -- or greatly assisted -- by an earlier order imposed by another court located in the county. Tex. R. Civ. P. 330(h). In light of this overlapping authority and responsibility, it is incongruous to suggest that district court judges do in fact exercise "full" authority over the office.

impediment to subdividing that single position so that minority voters have the opportunity to elect a "share." In the instant case, however, this Court is not concerned with the election of one single member position; rather, this Court is concerned with the election, within discrete geographic areas, of as many as fifty-nine judges with virtually identical functions. The instant case is unlike *Butts*; there is no physical impediment to elections from smaller representative areas.

One court has already specifically addressed the problem with which we are faced. In *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989), the court rejected the application of *Butts* to the election of several trial judges from a single county.[20]

> In effect, the at-large boundaries [in Butts]

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[20] The *Siegelman* court concluded, and I agree, that the courts in both *Butts* and *United States v. Dallas County Comm'n*, 850 F.2d 1433 (11th Cir. 1988) implicitly utilized the term "single-member office" to refer "to a situation where under no circumstances will there ever be more than one such position in a particular geographic voting area." *Siegelman*, 714 F. Supp at 518.

> coincide with the only "district" boundaries possible; because there is only one position to be filled, it becomes impossible to split up the jurisdiction any smaller. The concept of vote dilution is effectively rendered meaningless and such offices are inappropriate for section 2 vote dilution challenges. There is no such rationale, however, for not applying section 2 to elected positions merely because "the full authority of that office is exercised exclusively by one individual," as the defendants would have this court do.

Siegelman, 714 F. Supp. at 519-20 (footnotes omitted).

The approach in *Siegelman* is consistent with the Supreme Court's analysis in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles*, the Supreme Court stated that a threshold inquiry in a claim that an at-large election system dilutes minority voting strength is whether there is evidence that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. "The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." *Gingles*, 478 U.S. at 40 n.17. Proof of this geographically compact

minority population essentially isolates the at-large electoral structure as the feature which has the potential to deny the minority fair electoral access. The maintenance of an at-large election scheme is not dilutive, however, where the electoral scheme in the relevant jurisdiction is indivisible because there is only one position to be for the particular jurisdiction.

Applying this reasoning, I continue to urge the adoption of the *Siegelman* court's definition of single member office:

> The *true* hallmark of a single-member office is that only one position is being filled for an entire geographic area, and the jurisdiction can therefore be divided no smaller. While mayors and sheriffs do indeed "hold single-person offices in Alabama," they do so because there is only one such position for the entire geographic area in which they run for election. ... It is irrelevant, in ascertaining the potential existence of vote-dilution, that these officials happen to exercise the full authority of their offices alone.

Siegelman, 714 F. Supp. at 518 n. 19 (emphasis original).

The *Siegelman* court is not alone in its approach to a claim of vote dilution. Several courts have found Section 2 violations in cases arising from similar factual situations.

For example, in *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), the district court assumed that districts with more than one judicial position were properly characterized as multi-member districts. Similarly, in *Haith v. Martin*, the district court concluded that because North Carolina Superior Court judgeships are "designated seats in multi-member districts, ... they are subject to section 5 preclearance requirements." 618 F. Supp. 410. Quoting the language of Section 2, the *Haith* court stated that "the Act applies to all voting without any limitation as to who, or what, is the object of the vote." *Id.* at 413. *See also Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987); *Williams v. State Board of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988).

The concurrence, noting that *Haith*'s focus was preclearance under Section 5 and not the merits of a vote dilution claim under Section 2, discounts this reference to the designation of trial judges as part of a multi-member body. Yet, even while urging that *Haith* is irrelevant to the instant

case because it involves Section 5 preclearance, the concurrence notes that there is no reason to distinguish between Section 5 and Section 2 with "respect to their applicability to judicial elections." Concurring Opinion at 28. The concurrence's conclusion is based on the realization that

> [t]o hold otherwise would lead to the incongruous result that if a jurisdiction had a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if the state sought to introduce that very procedure as a change from existing procedures, it would be subject to Section 5 preclearance and could not be implemented.

Id. The concurrence, while clearly acknowledging the interlocking nature of Section 2 and Section 5, simply exempts from its reasoning those judges who are said not to act collegially; the concurrence's logic is strained and internally inconsistent.

A violation of the Voting Rights Act occurs where the challenged system effectively discourages equal participation in the electoral process and lessens the opportunity of

minority voters to elect representatives of their choice. Where several officials, performing essentially the same job, are elected at-large from one geographic area, the potential for vote dilution is no less tangible simply because each official acts independently of the others. As the court in *Siegelman* stated, there exists "no rational reason why the concept of vote dilution cannot, or should not, apply to elected members of the judiciary simply because judges exercise their authority in solitude." 714 F. Supp. at 520.

The concurrence attempts to shore up its argument that there can be no dilution of votes for the district judge positions in the instant case by asserting that the independent nature of the trial judge is integral to the linking of jurisdiction and elective base. The concurrence argues that

> Texas has structured its government such that it wields judicial power at the trial level through trial judges acting separately, with a coterminous or linked electoral and jurisdictional base, each exercising the sum of judicial power at that level, and all with review by courts acting collegially. We are persuaded that, because the fact and appearance of independence and fairness are so central to the judicial task, a state may

> structure its judicial offices to assure their presence when the means chosen are undeniably directly tailored to the objective. The choice of means by Texas here -- tying elective base and jurisdiction -- define the very manner by which Texas' judicial services are delivered at the trial court level. They define the office. Nothing in the Voting Rights Act grants federal courts the power to tamper with these choices.

Concurring Opinion at 31-32. Essentially, the concurrence argues that the union of elective base and jurisdiction defines the *very nature* of the Texas district judge position. Having posited the Texas office of district judge, the concurrence concludes that there is "compelling necessity sufficient to overcome the strict scrutiny of state acts impinging upon a fundamental interest." *Id.* at 32. The concurrence's assertions, however, are contrary to the realities of the Texas system. Any modification in the elective base of a judicial district will not destroy *the essence* of the district judge position any more than have the persistent modifications in the jurisdiction of Texas district courts. It is inconceivable that the remedial imposition of a non-dilutive electoral scheme would have a more than negligible effect on the

method by which judges exercise their authority. The concurrence cites no evidence--because there is none--that the *very nature* of the judicial office will be irreparably damaged by a modification in the elective base. In the absence of such evidence, it can hardly be said that the continued unmodified union of elective base and jurisdiction is a "compelling" state interest which militates against the application of the Voting Rights Act.

Undeterred by the obvious irrelevance of the acclaimed union between elective base and jurisdiction, the concurrence urges an additional state interest against the application of the Voting Rights Act--the appearance of judicial impartiality. The concurrence argues that the appearance of impartiality is a *defining element* of Texas' district judgeships. Again, the concurrence's attempts to manufacture a "compelling" state interest belie its desperation to achieve a result that would not require the displacement of the present electoral scheme. The fact that

Texas currently elects judges from county-wide areas in order to promote the appearance of impartiality speaks to the state's interest in retaining the current system; it does not speak to the *very definition* of the official post. The interest in retaining an appearance of impartiality is a factor which may be considered when, pursuant to *Gingles*, the totality of the circumstances are examined to determine if a Section 2 violation exists. However, this factor--the appearance of impartiality--is *absolutely irrelevant to the preliminary question of the applicability of Section 2.*

The instant case reveals an electoral scheme which is "discriminatory but corrigible."[21] Each county elects three to fifty-nine district court judges. In each county, all judges have the same authority and exercise the same responsibility. With the exception of specialty courts, all judgeships are essentially fungible; within each specialty, the judgeships are

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[21] While creating smaller districts exists as a potential means to remedy impermissible vote dilution, it is not an exclusive remedy. A legislature is at liberty to implement any electoral system which will alleviate vote dilution.

also fungible. Section 2 requires that once correctable vote dilution has been established, it must be eradicated by the implementation of a plan which will "completely remedy"[22] the violation by "fully provid[ing an] equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. at 31.

The State's Interest in Retaining the Current System

The defendants argue that elections for trial judges present strong state interests in retaining an at-large election system. Even if this contention has merit, the State's asserted interests are relevant only to the inquiries of whether plaintiffs have proven a Section 2 violation under the totality of the circumstances and, if so, what remedy would be most appropriate to alleviate the dilution of minority voting strength, while intruding on state interests only to the extent necessary to accomplish the task.

In *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)

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[22] *Dillard*, 831 F.2d at 252.

(en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam), this Court set forth a non-exclusive list of factors to be examined when applying the totality of the circumstances test.[23] In *Gingles*, the Supreme Court reaffirmed the totality of the circumstances approach to a vote dilution claim. In doing so, the Supreme Court noted that the "factors were derived from the analytical framework of *White v. Regester* ... as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer*...." *Gingles*, 478 U.S. at 36 n.4 (citations omitted). The Supreme Court went further than the mere application of the totality test, however, and established a three-part foundation for the proof of a Section

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[23] The factors include (1) the history of discrimination in the state; (2) the extent to which voting is polarized by race; (3) the existence of practices or procedures which enhance the opportunity for discrimination; (4) whether minority groups have been denied access to a candidate slating process; (5) the existence and extent of any socio-political vestiges of discrimination; (6) whether political races are characterized by overt or covert racial appeals; and (7) the extent to which minority groups have been elected in the jurisdiction. In addition, the legislative history of the Act instructs that an inquiry into the responsiveness of the elected officials to minority needs and the legitimacy of the state's asserted reasons for maintaining the existing system may provide additional insight.

2 vote dilution claim. The minority group must demonstrate first that it is sufficiently large and geographically compact to constitute a majority in a single-member district; second, that the minority is politically cohesive; third, that the majority votes sufficiently as a bloc to usually defeat the minority's preferred candidate. *Id.* at 50-51.[24] Once the plaintiffs have satisfied these three threshold requirements, as they did here, the district court proceeds to the totality of the circumstances inquiry.

The concurrence in the instant case, however, totally ignores the plaintiffs' successful compliance with the *Gingles* three-part foundation showing. It is by this ruse that the concurrence never reaches the federal district court's treatment of the vote dilution factors based on its *per se* exclusion of at-large elections for trial judges from the scope

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[24] Unless these threshold *Gingles* factors are established, "the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice." *Gingles*, 478 U.S. at 48.

of Section 2(b).[25] It must now be apparent that the concurrence's fundamental basis for denying minority groups the opportunity to challenge their exclusion from the process of judicial self-government is simply that the concurrence finds the concept of subdistricting unappealing as a proposed remedy. The only legitimate point at which to weigh this factor, however, is at the proof and remedy stages, when the countervailing factors of voting discrimination, as initially

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[25] In holding that the current at-large scheme for electing Texas district court judges violates Section 2, the federal district court made numerous specific factual findings regarding the *Gingles* threshold factors as well as the Senate Report, or *Zimmer*, factors. For purposes of this dissent, it need not be decided whether the district court correctly determined these factual issues. It should be noted and flagged at this point, however, that the trial record is replete with evidence of an inescapable reality: minorities in the challenged Texas districts are seldom ever--indeed, are only with great rarity--able to elect minority candidates to any of the at-large district court judge positions available in the districts.

It is necessary to indicate that this writer would not affirm the interim remedial portion of the district court's order in toto. Specifically, I am constrained to conclude that the district court acted beyond the scope of its remedial powers by ordering that judicial elections be nonpartisan. The district court's order fails to defer to a political choice of the State of Texas, a choice which was not even challenged by the plaintiffs in the instant case. The district court gave no explanation for rejecting the system of partisan elections. No evidentiary hearing was held on the issue, and no factual findings were made. The equity powers of the district court neither encompass nor justify the federal district court's actions; the district court should have deferred to the State's policy choice for partisan elections as expressed in its statutory scheme.

determined by the district court -- including, in particular, the plaintiffs' inability to elect their preferred candidates -- may be fully taken into balance..

Similarly, the State's interest in retaining an at-large election scheme is a factor to be weighed by a court applying the totality test only after the existence of the threshold *Gingles* factors has been determined.[26] In the instant case, the State has not articulated so compelling an interest in retaining the existing electoral scheme that the dilution of minority votes should go unremedied.[27]

When assessing the point at which a state's articulated interest in retaining the current at-large scheme should be considered, the Supreme Court's acknowledgment that the

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[26] The current administration endorses this approach. In an amicus brief filed in the instant case, the United States has argued that the proper approach is to consider, first, whether plaintiffs have met the three-part test outlined in *Gingles*. Assuming that this has been done, it is then appropriate to consider other factors set out in *Gingles*, and to weigh in particular the importance of the state's interest in the electoral system under attack.

United States Brief at 13.

[27] No opinion is expressed whether such a situation may ever be demonstrated.

Senate factors are secondary considerations, behind the three-part *Gingles* test, is of particular relevance.[28] Specifically, the Supreme Court noted that, while the Senate Report factors "may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the [three threshold factors], the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice." *Gingles*, 478 U.S. at 48. From this language, it is beyond dispute that the Supreme Court has articulated a legal test for vote dilution claims which anticipates a threshold showing only of geographical compactness, political cohesion, and

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[28] The concurrence, by treating considerations such as the appearance of impartiality and venue rules as definitive elements of the relevant elected post, has avoided the need to analyze at what point a state's asserted interest in retaining the existing scheme should be considered. As has already been discussed in footnote 16, these considerations are not part and parcel of the trial judge post.
What the concurrence has done, instead of examining the State's interest in retaining the existing scheme, is to consider the State's interest in *not implementing* a voting scheme similar to that imposed under the interim plan (subdistricting) in order to alleviate any potential vote dilution. This approach positions the remedy squarely in a place of incorrect prominence and foregoes any serious inquiry into the existence of impermissible vote dilution. Stated simply, the concurrence has placed the cart before the horse.

white bloc voting sufficient usually to prevent election of the minority's preferred candidate.[29]

The conclusion that a state's interest is properly considered in the second phase of the *Gingles* analysis is bolstered by the Senate Report's indication that the list "of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered." *Id.* at 45 (footnote omitted). The Report stresses that no particular factors need be proved and neither the existence nor the non-existence of a majority of factors dictate the outcome. Rather, the determination of whether the political processes are equally open depends on an evaluation of the relevant political process. It is during this

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[29] By articulating a threshold test which examines three characteristics of the minority group and its voting patterns, the Supreme Court has implicitly stressed the proposition that the Voting Rights Act is primarily concerned with the efficacy of the minority vote and not with the function or characteristics of the elected post.

examination of minority access to the relevant jurisdiction's political process that a state's interest in retaining the existing system is particularly relevant.

Congress most certainly did not intend to frustrate the important state interest in a fair and impartial judiciary; at the same time, however, Congress expressed the affirmative intent to replace unlawfully dilutive electoral systems with ones in which minorities would have a full and fair opportunity to participate. In enacting Section 2(b) of the Voting Rights Act in 1982, it is clear that Congress was continuing the struggle to make the Act responsive to the needs and aspirations of the nation--to make absolutely certain that the fundamental right of minorities to cast an effective vote for candidates of their choice was not abridged.

For these reasons, it is imperative that a court first proceed to determine whether the *Gingles* three-part test has been met; only then should a court proceed to consider,

under the "totality of the circumstances," other relevant factors,[30] including the state interest in maintaining an at-large election system, to determine whether, on balance, the plaintiffs have proved a Section 2 violation.[31]

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[30] For example, one of the two "[a]dditional factors that in some cases have had probative value" in the Senate Report's illustrative list of totality of the circumstances factors is "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S. Rep. No. 417, 97th Cong., 2d Sess. 29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 207. In the proceedings below, the district court considered this factor at the appropriate point -- during a trial on the merits. The district court was not persuaded by defendants' defense that at-large elections served a critical state interest. The court determined that "[w]hile the Court does not find that the present system is maintained on a tenuous basis as a pretext for discrimination, the Court is not persuaded that the reasons offered for its continuation are compelling." District Court Opinion at 77.

[31] Because of my view that the State has not articulated a substantial interest in retaining the existing at-large system of electing district judges, the question of how much weight this factor should be afforded is not addressed. As the Supreme Court has indicated, "recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others ... effectuates the intent of Congress." *Gingles*, 478 U.S. at 49 n. 15. It is my firm believe, however, that under no circumstances should the State's interest outweigh the following factors: the extent to which minority group members have been elected to office in the jurisdiction and the extent to which voting in the elections of the jurisdiction has been racially polarized. This belief is based on my acknowledgement of the Supreme Court's indication that "[u]nder a 'functional' view of the political process mandated by § 2 ... the most important Senate Report factors bearing on § 2 challenges to multimember districts are [these factors.]" *Id.* Additionally, placing greater weight on the factors which examine minority success at the polls and racial voting patterns furthers the purpose of the Act to "correct an active history of discrimination ...[and] deal with the accumulation of discrimination." S. Rep. at 5.

In the instant case, the State asserts the following interests as justification for retaining its dilutive electoral system: (1) ensuring popular accountability by making judges' jurisdiction coterminous with the electoral boundaries; (2) avoiding bias caused by small electoral districts; and (3) preserving the administrative advantages of at-large elections, including the use of specialized courts. The concurrence would not only accept the existence of these interests, but would characterize them as compelling.

Accountability: The State has advanced the argument that at-large elections provide greater accountability of the judge to county voters. The Chief Justice of the Texas Supreme Court testified that judges are "accountable to those people who can be hailed [sic] into their court," because people who feel they have been wronged by a particular judge may vote against that judge in the next election. Ostensibly, the district court's interim plan eliminates

effective accountability. The concurrence notes that under the district court's interim plan, for example, a minority litigant has "a 98.3% chance of appearing before a judge in whose election he had not been able to vote." Concurring Opinion at 44.

The concurrence's argument that judges must be "accountable" to potential *litigants* is an affront to the judiciary of the State of Texas. An honorable judiciary separated from the influence of others is "*indispensable* to justice in our society." Canon 1 of the Texas Code of Judicial Conduct (emphasis added). District judges are charged to apply the law, not respond to the expectations of litigants. To say that a district judge must be accountable to litigants is to suggest the unthinkable of great numbers of highly respected, dedicated public servants. Not only is such a suggestion misleading to a public already mystified by the bench and bar, it is offensive to those who have occupied distinguished positions as Texas state district judges in the

past, as well as those who now occupy such positions.

Even if "accountability" were a legitimate state interest, it is not a compelling reason to justify the current dilutive system. Under the existing system, it is highly probable that a case will be heard outside the county in which a litigant lives. In such a case, at least one--and probably both--of the parties will be appearing before a judge who was elected by a population which does not include that litigant. The argument that judges must remain "accountable" to potential litigants in their courts (nauseous as this straw man specter may be) pales in light of the current Texas venue rules, which frequently require that an out of county resident appear before a judge for whom the litigant neither cast a vote for nor against. Even further, in Texas, parties can agree to give a district court venue over a case not arising in the county. *Nipper v. U-Haul Co.*, 516 S.W.2d 467 (Tex. Civ. App.--Beaumont 1974, no writ).

The concurrence argues that Texas' elaborate system of

venue rules supports the argument that the State has demonstrated a concern for inter-county bias. However, any interest in ensuring accountability and the appearance of impartiality which may be suggested by the Texas venue scheme is lessened considerably by Texas' characterization of venue challenges as dilatory pleas which, if not raised initially, are waived. In light of such a practice, the state interest cannot be said to be compelling.

Aside from the complexities of the Texas venue rules, there are many other occasions when a party may appear before a judge elected by the residents of another county. For example, district court judges are frequently called into other counties to help with docket control. Despite the fact that the county's residents have no recourse against this out-of-county judge at the ballot box, Texas courts have upheld the constitutionality of this practice. *See, e.g., Reed v. State*, 500 S.W.2d 137 (Tex. Crim. App. 1973). Nor is the practice of electing judges from subdistricts without

precedent in the state. Texas Justice of the Peace courts, lower level trial courts with jurisdiction over an entire county, are elected from sub-county precincts.[32] Thus, a litigant often may appear before a justice of the peace who lives in the same county as the litigant, but not the same judicial district.

Additionally, Texas authorizes the use of retired or senior state district judges, who wield all the powers of their elected and active peers. Such a judge was, of course, at one time elected to that office. Upon retirement, however, that judge while sitting is vested with the complete authority of the office and is not subject to election or reelection. Simply stated, Texas' retired or senior judges contribute

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[32] In *Martin v. Allain*, 658 F. Supp. 1183, 1195-96 (S.D. Miss. 1987), the court adopted a single-member district remedy for some Mississippi trial judges who were elected at-large in racially dilutive elections, after finding that Mississippi already elected some other judges from areas smaller than the court's jurisdiction. The court there stated:

> Although the state has adopted the policy of the post system of electing judges in multi-member judicial districts above the justice court level, it long ago adopted the policy of single-member electoral districts for justice court judges. The state also has the policy of judges deciding cases which may originate outside their election districts.

greatly to the reduction of court dockets, but they are no longer accountable in any fashion to the electorate. *See* Tex. Gov't Code Ann. §§ 75.001 - .002 (Vernon 1988).

There seems to be no basis in fact for the State's contention that county-wide accountability is essential to the proper selection of district judges, or that any measure of electoral accountability is significantly defeated by dividing the county into smaller electoral districts.

A Fair and Impartial Judiciary: Both the State and intervenors put on witnesses who testified that the creation of subdistricts was inadvisable because it could lead to perceptions of judicial bias and undue influence by special interests. Specifically, the witnesses testified that judges elected from smaller districts would be more susceptible to undue influence by organized crime or to pressure by other political sources including special interest groups.

The concurrence accepts this argument, and urges in addition that subdistricting "would change the structure of

the government because it would change the nature of the decision-making body and diminish the appearance if not the fact of judicial independence."[33] Concurring Opinion at 44. The concern that a judge elected from a small electorate is more susceptible to improper pressure, however, has not prevented or impeded Texas from creating judgeships in counties with relatively small populations. Texas has 386 district judges. A significant number of these judges are elected from districts of less than 100,000 people; indeed, in some districts, as few as 24,000 to 50,000 people constitute the relevant electorate. Even if Harris County (with a population of 2.5 million people) were divided into as many as fifty-nine subdistricts (the number of district courts of general and special jurisdiction), each district would contain

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[33] Once again, the concurrence's asserted concern is premised on the anticipated remedy -- subdistricting. While the Supreme Court, in *Gingles*, did indicate that a "single-member district is generally the appropriate standard against which to measure minority group potential to elect," it did not mandate the imposition of subdistricts to remedy every instance of illegal vote dilution. The concurrence, by erroneously factoring in, at the liability phase, concerns which may never be borne out, refuses to properly acknowledge the intent of the Voting Rights Act.

approximately 41,000 people. If Dallas County were divided into thirty-seven subdistricts, each subdistrict would have approximately 42,000 people. In short, even if judicial districts in large counties were subdivided, the resulting subdistricts are unlikely to be smaller than many existing judicial districts in Texas. Consequently, the ostensible state interest against a small electorate in judicial districts has not been shown.

Furthermore, Texas law does not reflect the witnesses' fear that subcounty districts are inconsistent with the existence of a fair and impartial judiciary. Justices of the Peace are already elected from areas smaller than a county; in a very extended number of counties, these districts contain smaller populations than the hypothetical subdistricts of Dallas and Harris counties discussed above. For example, the Texas Constitution permits counties with as few as 18,000 people to be divided into four justice of the peace precincts. Tex. Const. art. 5, § 18(a).

The foregoing is sufficient to demonstrate the state has no compelling interest in retaining county-wide elections. Even if it were not, it is plainly dispositive that the Texas Constitution was recently amended to give voters the option of electing district judges from subdistricts. *See* Tex. Const. art. 5, § 7a(i). That no county has yet to implement such an elective scheme does not alter the reality that such a change already has the blessing of the state legislature. In light of this constitutionally authorized electoral scheme, the State cannot now say that it has a compelling interest in *not* electing district judges from an area smaller than a county.

Considering the precedent for the creation of judicial subdistricts, the size of the potential subdistricts, and the lack of any real indication that perceived impropriety would result,[34] the state's asserted interests do not support the continuation of its present dilutive electoral system.

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[34] It is also notable that one judge, an intervenor in the instant case, testified that he was not aware of any allegations of unfairness or suggestions that white litigants were not treated fairly by minority judges elected from subcounty Justice of the Peace precincts.

Administrative Advantages: The State has cited the administrative advantages of the present system, including the county-wide retention of records, the random assignment of cases to judges within the county and county-wide jury empaneling. There is no reason why an electoral scheme utilizing subdistricts cannot retain each and every one of these administrative features; any remedy which might be imposed in this case need not require that a judge elected from a subcounty area have jurisdiction only over that area. In fact, the interim plan fashioned by the district court in the instant case specifically retained all of the foregoing valid administrative features. Furthermore, even if retention of certain administrative conveniences were not possible under a remedial scheme, that fact cannot justify the continuation of an otherwise racially dilutive electoral process. *See Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201 (5th Cir. 1989).

The concurring opinion attempts to place great weight

on the interest of the State in retaining the system of "specialty" courts. But there is absolutely no reason why a remedy would be unable to accommodate this interest by retaining these courts of specialized jurisdiction.[35] Most counties which utilize the administrative convenience of specialty courts have several of each court; consequently, a remedy could be formulated which retains the use of such courts.[36] It cannot be gainsaid that the State has almost unlimited flexibility to devise a remedial plan which retains specialty courts and all of the other important government interests while eradicating the dilution of minority voting strength. It is critical that it be understood that the history, the intent, the text and spirit of the Voting Rights Act in general and Section 2 in particular mandates the

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[35] It should be noted that the Texas Constitution limits the State's interest in establishing specialty courts; the state supreme court has ruled that the legislature may not disturb state courts' jurisdiction.

[36] Because the district court, in its interim plan, indicated the belief that a remedy could be created which allows the substantial use of the Texas system of specialty courts, District Court Order at 7, this writing expresses no view on whether or not a state's interest would be substantially stronger if such a remedy could not be devised.

implementation of just such a remedial electoral scheme.

Summary: Taken together, the State's attempt to articulate its interest in retaining the current voting system pales when compared to the clear purpose of the Voting Rights Act. The State has not shown an inalterable policy of not subdividing districts, nor has it shown that judges would be less accountable to the electorate if elected from a subdistrict. Further, there is no indication that any impropriety, real or perceived, on the part of judges elected from smaller units would in fact occur. Finally, while the State may indeed have a legitimate interest in retaining specialty courts, the State has failed to demonstrate why that interest cannot be effectuated in an electoral scheme which does not dilute minority voting strength.

III.

CONCLUSION

"The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which

has infected the electoral process in parts of our country for nearly a century."[37] It is my most earnest conviction that the majority and concurrence have each chosen erroneous methods to examine the particular specimen of vote dilution asserted by the plaintiffs and found by the district court here. The true method that both have missed has been obscured by their failure to recognize the true meaning of the Voting Rights Act, and by their failure to comply with the strictures of *Gingles*. The majority, abandoning established precedent, has determined that Section 2 of the Voting Rights Act does not apply to any judicial elections. The concurrence has looked to the *function* of the elected official, and the duties and powers of the official once in office, to conclude that, because trial judges act independently, at-large elections cannot result in minority vote dilution. There is simply no support in the words of the Act, in the legislative history of Section 2, nor in logic for either the majority or the

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[37] *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966).

concurrence's embrace of such result-oriented determinations.

The position of each Administration has been that the Voting Rights Act applies to judicial elections. The current Administration goes even further and strongly urges that Section 2(b) was violated by the electoral scheme that was utilized here to elect certain Texas district court judges.

The Voting Rights Act is in no way concerned with the names or positions listed on the ballot. The United States Congress, by enacting the Voting Rights Act, has instructed that this and every other court focus on the voter, particularly the minority voter, and the efficacy of each vote cast, so as to ensure that minorities are not denied an equal opportunity to participate effectively in the democratic process.

I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

Filed November 08, 1989
CIVIL ACTION NO. MO-88-CA-154

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), COUNCIL #4434 et al.,

Plaintiffs,

AND
HOUSTON LAWYERS ASSOCIATION, et al.,

Plaintiff-Intervenors,

v.

JIM MATTOX, et al.,

State Defendants

AND
JUDGE SHAROLYN WOOD AND JUDGE F. HAROLD ENTZ.

MEMORANDUM OPINION AND ORDER

The above-captioned cause came on for trial before the Court on September 18, 1989. This suit was brought by named individual Plaintiffs and members of the League of United Latin American Citizens ("LULAC"), Council #4434, LULAC Council #4451 and LULAC Statewide. Plaintiffs are Mexican-American and Black citizens of the State of Texas. Plaintiffs seek (1) a Declaratory Judgment that the existing at large scheme of electing State District Judges in nine (9) target counties of the State of Texas violates Plaintiffs' civil rights by unconstitutionally diluting the voting strength of Mexican-American and Black electors in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (West Supp. 1989) ("Voting Rights Act")[1]; (2) a

[1] Section 2 provides in pertinent part:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color ...
>
> "(b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

(Emphasis in the original.)

permanent injunction prohibiting the calling, holding, supervising or certifying any future elections for District Judges under the present at large scheme in the target areas; (3) formation of a judicial districting scheme by which District Judges in the target areas are elected from districts which include single member districts; and (4) costs and attorneys' fees.

This case really had its beginning in 1965, when Congress passed the Voting Rights Act and it was signed by President Johnson. This Act, as everyone knows, had as its purpose "to rid the country of racial discriminating in voting."

The next chapter in the saga was the holding in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied, sub nom, Chisom v. Edwards*, 109 S.Ct. 310 (1989) (*Chisom I*). In *Chisom I* Judge Johnson held: "Minorities may not be prevented from using Section 2 [of the Voting Rights Act] in their efforts to combat racial discrimination in the election of state judges; a contrary result would prohibit minorities from achieving an effective voice in choosing those individuals society elects to administer and interpret the law."

Having concluded, as will later be pointed out in formal Findings of Fact and Conclusions of Law, that there is racial discrimination in the election of state judges in some counties of the State of Texas, and the law plainly being that such discrimination is prohibited by the Voting Rights Act, this opinion should not come as any surprise to the attorneys or judges of this State.

Mr. Justice Holmes, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, in dissenting, said:

> I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.

This dissent has been on the books for 83 years and, while this Court recognizes that some judges may legislate, this Court is extremely reluctant to do so. Legislation should be done by legislators. This Court has determined that our current system, as it applies to some counties, violates Section 2 of the Voters Rights Act. Some fixing has to be done, because the current system is broken.

In writing this opinion, I am cognizant of the fact that our Texas Constitution will need to be amended. Legislators should seriously consider nonpartisan elections for District Judges. As Chief Judge Tom Phillips pointed out in his testimony, it really makes no sense that judges are selected because of their political affiliation. A judge should decide matters before him without regard to partisan politics. It speaks well of our current judiciary that our sitting judges

have been able to make decisions without regard to whether the judge is Republican or Democrat.

As long as judges, however, are selected on a partisan ballot, there will be some rancor and enmity between the successful and the unsuccessful candidate. The loser is going to have regrets by virtue of the fact that she or he did not secure enough votes in an election. It makes no sense to believe that a judge is selected because the top of the ticket is either weak or strong. This Court felt the animosity between certain judges in the courtroom. There is no need for this. Certainly judicial reform will not make all candidates live by the Golden Rule, but it is a step in the right direction. It was brought to the Court's attention that perhaps a majority of the voters in a General Election, and for that matter, in Primary Elections, have no idea of the qualification of a judge for whom they vote. Their vote is cast because a straight ticket is being cast, and a straight ticket includes judicial nominees from a particular political party.

If the Constitution is to be changed, would it not make sense to have judges elected when members of school boards or city councils are elected? These races are traditionally nonpartisan, and people going to the polls to vote for school trustees or mayors have for the most part some idea of the qualifications of the candidates. Judges could be selected at the same time in order to make sure that one was not getting votes simply because one is Democrat or Republican. Minority voters could go to the polls with their heads held high and with some realization that their preferred candidate either would be or could be elected.

Certainly, it is not Court's intention to tell the legislature how its job is to be accomplished. Single member districts may or may not be the answer if we are to continue to have partisan elections. There may be easier and better solutions that can evolve through the legislative process.

These are troubled waters. One hesitates to plunge into such waters, because our system of selecting judges has, for

the most part, served us well for many many years. Our Congress, however, in 1964, made changes. Our Courts have construed those changes, and it is now necessary to move forward so that minorities can realize the rights legally bestowed upon them, and which have, in the past, been denied.

THE PRESENT AT-LARGE SYSTEM

This litigation challenges the system of electing 172 District Court Judges at-large from areas composed of entire counties.[2]

The present system of electing District Court Judges in Texas requires that each judge be elected from a District no smaller than a county. Tex. Const. Art. 5 § 7a(i) (Vernon Supp. 1989).[3] Each Judge serves a term of four (4) years. Tex. Const. Art. 5 § 7 (Vernon Supp. 1989). Candidates for

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[2] The counties at issue are: Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland.

[3] This system is "at-large" because judges are elected from the entire county rather than from geographic subdistricts within the county.

District Judge must be citizens of the United States and the State of Texas, licensed to practice law in this State and a practicing lawyer or Judge of a Court in this State, or both combined for four years. *Id.* Candidates must have been a resident of that election district for at least two (2) years and reside in that district during his or her term of election. *Id.* District Court Judges must be nominated in a primary election by a majority of the votes cast. Tex. Election Code § 172.003 (Vernon 1986). Each candidate's political party is indicated on the election ballot. Judicial candidates are usually listed far down on an election ballot. They run for specifically numbered courts and must secure a plurality of the vote in the general election to win a judicial seat.

METHODOLOGY, DATA AND ELECTIONS ANALYZED

Statistical analysis is the common methodology employed and accepted to prove the existence of political cohesiveness and racial bloc voting necessary to establish a

voter dilution case.[4] Ecological regression analysis[5] and extreme case analysis[6] were the types of statistical analysis used by Plaintiffs' experts in the present case.[7]

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[4] In *Thornburg v. Gingles*, 479 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), Justice Brennan held that racial bloc voting can be established by a type of abstract statistical inquiry called "bivariate regression analysis." This analysis correlates the race of the voters and the level of support given to the candidate. *Id.* at 61. If a candidate is supported by a large proportion of the minority group yet does not win, the vote is declared to be racially polarized in a legally significant sense and racial bloc voting is taken to be established.

All variables beside race of the voters and support given the candidates that might also explain voters' choices are expressly excluded from consideration. In Justice Brennan's view, "[i]t is the difference between the choices made by [minorities] and whites - not the reasons for that difference - that results in [minorities] having less opportunity than whites to elect their preferred representatives." *Id.* at 63.

[5] Ecological regression analysis shows the relationship between the ethnic composition of voting precincts and voting behavior, i.e., which candidate receives how many votes from each race/ethnic group. This type of analysis incorporates the use of a coefficient of correlation or Pearson r, accompanied by an estimate of the statistical significance of r, the coefficient of determination and the regression line. *See Overton v. City of Austin*, 871 F.2d 529, 539 (5th Cir. 1989).

[6] Extreme case or homogenous precinct, analysis looks to homogenous precincts in which almost all of the people of voting age belong to one ethnic group. If race/ethnicity reflects voting behavior, then election results in predominately minority precincts should differ from results in predominately Anglo precincts.

[7] The majority which agreed with Justice Brennan that voter dilution was demonstrated by the impact or results of the *Zimmer* factors and the *Gingles* threshold analysis deserted him when he came to the proof of the second and third *Gingles* factors.

The data used by Plaintiffs to support their statistical analysis varied according to the type of information available to them since the 1980 Census. Plaintiffs used voting age population data by census tract to establish the *Gingles* 1 factor of size and geographic compactness. Plaintiffs used a variety of data sets to establish the *Gingles* 2 cohesiveness and Gingles 3 white bloc voting factors depending on information available in the County in question.

Justice White maintained that under Justice Brennan's test there is racially polarized voting whenever a majority of whites vote differently from a majority of blacks, regardless of the race of the candidates. *Gingles*, *supra*, at 83. To illustrate his disagreement, Justice White posited the hypothetical which assumed an eight-member multimember district that was 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Justice White further assumed that there were six white and two black Democrats running against six white and two black Republicans. Justice White wrote, "[u]nder Justice Brennan's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominately black areas vote Democratic." *Id.* at 83. Justice White concluded that such analysis was "interest-group politics rather than a rule hedging against racial discrimination." *Id.* at 83.

Justice O'Connor and the three other Justices for whom she wrote did not reject bivariate regression analysis solely to establish political cohesiveness and assess the minority groups prospects for electoral success. *Id.* at 100. However, Justice O'Connor did reject Justice Brennan's position that evidence that explains divergent racial voting patterns is irrelevant.

In Counties where Plaintiffs presented a case on behalf of Hispanics only, they relied on the percentage of Hispanic registered voters in voting precincts in any given year. These figures were based on Spanish surname counts done by the Secretary of State of Texas. In other instances, Plaintiffs used counts of Black and Hispanic totals or voting age population in each precinct of a particular county. When counts were not available, Plaintiffs based their analysis on 1980 census information. In some counties, precincts retained the same boundaries reported in the 1980 census. 1980 census data from precincts with unchanged boundaries were used in those counties. In several counties, Plaintiffs reconfigured precinct lines[8] and used demographic data from these newly created precincts. When relying on census data, Plaintiffs calculated the number of non-minorities within

[8] This process requires comparing new precinct maps with their new lines and census block maps that show racial composition of the blocks. This process is frequently used to update precinct data.

precincts by subtracting the number of Hispanics and Blacks from the total number of persons within the precinct.

Plaintiffs' experts only reviewed elections where a minority candidate opposed an Anglo. They preferred to analyze general elections, however primary elections were analyzed when no minority candidate made it past that stage of the electoral process.

The Supreme Court in *Thornburg v. Gingles*, *supra*, requires the analysis of several elections to determine if there is a pattern of voting related to race/ethnicity. In the present case, when there were District Court elections in a county in question in which a minority opposed an Anglo, Plaintiffs relied solely on analysis of District Court elections. In some Counties this included both general and primary elections. Where there were not enough such District Court elections other elections were analyzed. First, County Court elections in which minorities opposed Anglos were selected. Next, Plaintiffs turned to Justice of the Peace elections where the

election district was at least as large as a city within the county at issue. Finally, if no relevant local judicial races occurred, Plaintiffs analyzed statewide judicial elections. *See* Testimony of Dr. Robert Brischetto.

All jurisdictional prerequisites necessary to the maintenance of the claims of the parties have been fulfilled. After reviewing the testimony and exhibits introduced at trial, as well as the arguments and authorities of counsel, the Court hereby enters the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52.

FINDINGS OF FACT

INDIVIDUAL PLAINTIFFS

1. The names and counties of residence of the ten (10) named individual Plaintiffs are as follows: (a) Christina Moreno - Midland; (b) Aquilla Watson - Midland; (c) Joan Ervin - Lubbock; (d) Matthew W. Plummer, Sr. - Harris; (e) Jim Conley - Bexar; (f) Volma Overton - Travis; (g) Gene Collins - Ector; (h) Al Price - Jefferson; (i) Mary Ellen Hicks

- Tarrant; and (j) Rev. James Thomas - Galveston. Each named Plaintiff is a citizen of the United States registered and qualified to vote in District Court elections in Texas. Except for Christina Moreno, who is Hispanic, each named Plaintiff Black.

ORGANIZATIONAL PLAINTIFFS

2. Plaintiffs LULAC #4434 and LULAC #4451 are local chapters of the larger Statewide LULAC organization. Members of the LULAC Statewide organization reside in all of the counties challenged in this suit. Depo. of John Garcia. The organization is composed of both Mexican-American and Black residents of the State of Texas. The members of LULAC #4434 reside in Midland County. The members of LULAC #4451 reside in Ector County.

3. Plaintiff-Intervenor the Houston Lawyers Association ("HLA"), is an association of Black lawyers in Harris County. The participation of Plaintiff-Intervenor the

Texas Black Legislative Caucus ("TBLC") is limited to the remedy stage of this litigation.

DEFENDANTS & DEFENDANT-INTERVENORS

4. Defendants are sued in their official capacities only. Defendant Jim Mattox is the Attorney General of the State of Texas and charged with the responsibility of enforcing the laws of the State.

Defendant George Bayoud is Secretary of State of Texas. As such he functions as chief elections officer charged with administering the election laws of the State. Secretary Bayoud is substituted as a party in this litigation for former Secretary of State Jack Rains.

Defendants Thomas R. Phillips, Michael J. McCormick, Ron Chapman, Thomas J. Stovall, James F. Clawson, Jr., Joe E. Kelly, Robert M. Blackmon, Sam M. Paxson, Weldon Kirk, Jeff Walker, Ray D. Anderson,

Leonard Davis and Joe Spurlock, II are members of the Judicial Districts Board[9] created by Art. V. Section 7a of the Texas Constitution and Art. 24.911 *et seq.* of the Texas Government Code. The Judicial Districts Board is charged with reapportioning districts from which District Court Judges are elected.

Sitting District Court Judge Sharolyn Wood, 127th District Court, Harris County and Judge Harold Entz, Jr., 194th District Court, Dallas County Intervened in their individual capacities as Defendants.[10]

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[9] Several members of the Judicial Districts Board were replaced by new members during the interim of this litigation. Michael J. McCormick replaced John F. Onion, Robert M. Blackman replaced Joe B. Evans and Jeff Walker replaced Charles Murray.

[10] Thirteen District Court Judges from Travis County initially intervened as Defendants. The Court struck their intervention at their request.

GINGLES THRESHOLD ANALYSIS

Size and Geographic Compactness

5. Harris County. Harris County has the largest population among the nine target Counties in this case. Plaintiffs are proceeding only on behalf of Black voters in Harris County. With a total population of 2,409,544,[11] its Black population is 473,698 (19.7%). There are 1,685,024 people of voting age,[12] with 305,986 (18.2%) voting age Black residents of Harris County. Plaintiffs' Harris County ("H") Exhibit 01.

There are fifty nine (59) State District Courts in Harris County. Black residents are concentrated in the North Central, Central and South Central sections of Harris

[11] In each County, Plaintiffs rely upon the 1980 Census for total population of Blacks and Hispanics within the County.

[12] For all Counties in this case, Plaintiffs relied on a computer print out of voting age populations prepared by the Data Center at Texas A&M University directly from 1980 U.S. Census tapes.

County. H-04, p. 2, Map of Proposed Districts.[13] Evidence was introduced that nine (9) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. Id. at 1; Plaintiff-Intervenor Harris County ("P-I H") Exhibits 2, 2a.

6. Dallas County. Dallas County is the second largest County involved in this case. Plaintiffs are proceeding only on behalf of Black voters in Dallas County. Dallas County has a total population of 1,556,549. Its Black population is 287,613 (18.5%). There are 1,106,757 people of voting age, with 180,294 (16%) voting age Black residents. Plaintiffs' Dallas County ("D") Exhibit 01.

[13] Plaintiffs drew districts in each County of approximately equal size based on the number of District Courts in the County. Plaintiffs calculated the size and number of precincts in each proposed district on the basis of both total population and voting age populations. This Court recognizes that the concept of "one man one vote" does not apply to the judicial elections. *Chisom I, supra*, at 1061. Accordingly, this Court's analysis rests upon Plaintiffs' calculation based upon voting age population. Plaintiffs drew each district on this basis under the assumption that each district should contain 1/n of the voting age population in the County, with n being the number of District Courts in the County. Plaintiffs' Post Trial Brief at 11.

There were thirty six (36) State District Courts in Dallas County at the time this case was filed. On September 1, 1989, the Texas Legislature created a thirty-seventh State Judicial District Court in Dallas County. Black residents are concentrated in the Central and South Central sections of Dallas County. D-04, p. 2, Map of Proposed Districts based on 36 District Courts. Evidence was introduced that seven (7) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1, 3-9;[14] Plaintiff-Intervenor Dallas ("P-I D") Exhibits 34. Plaintiff-Intervenors' Exhibit 7 reflects that there are approximately 36 homogeneous precincts of 90% Black population.

7. Tarrant County. Plaintiffs are proceeding only on behalf of Black voters in Tarrant County. Tarrant County

[14] Proposed single member districts 1 & 3 barely meet the Overton majority -minority voting age population requirement. These proposed districts contain 51.33% and 52.05% black voting age population respectively.

has a total population of 860,880. The Black population of Tarrant County is 101,183 (11.8%). There are 613,698 people of voting age, with 63,851 (10.4%) voting age Black residents of Tarrant County. Plaintiffs' Tarrant County ("Ta") Exhibit 01.

There are twenty three (23) State District Courts in Tarrant County. Black residents are concentrated in the Center of the County. Ta-04, p. 2, Map of Proposed Districts. Evidence was introduced that two (2) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1.

8. Bexar County. Plaintiffs are proceeding only on behalf of Hispanic voters in Bexar County. Bexar County has a total population of 988,800. Its Hispanic population is 460,911 (46.61%). There are 672,220 people of voting age with 278,577 (41.1%) voting age Hispanic residents of Bexar County. Plaintiffs' Bexar County ("B") Exhibit 01.

There are nineteen (19) State District Courts in Bexar County. Hispanic residents are concentrated in the Central and South Central sections of the County comprising most of the population of the City of San Antonio. B-04, p. 2, Map of Proposed Districts. Evidence was introduced that eight (8) Hispanic single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1.

9. Travis County. Plaintiffs are proceeding only on behalf of Hispanic voters in Travis County. With a total population of 419,335, its Hispanic population is 72,271 (17.2%). There are 312,392 people of voting age with 44,847 (14.4%) voting age Hispanic residents of Travis County. Plaintiffs' Travis County ("Tr") Exhibit 01.

There are thirteen (13) State District Courts in Travis County. The largest concentration of Hispanic residents in one area, if at all, appears to be located in the Eastern portion of the County. Tr-04, p. 2; Tr-05, p. 1, Map

of Proposed Districts. Mr. David Richards testified that in his opinion the Hispanic community was pretty well dispersed in Travis County. Nevertheless, evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) Hispanic voting age population was possible. *Id.* at 1. Plaintiffs' Exhibit Tr-04 depicts the single member Hispanic district proposed for Travis County. The Court finds that it is without moment that the proposed district appears to be minimally contiguous.

10. Jefferson County. Plaintiffs are proceeding only on behalf of Black voters in Jefferson County. Jefferson County has a total population of 250,938. Its Black population is 70,810 (28.2%). There are 179,708 people of voting age of which there are 44,283 (24.6%) voting age Black residents of Jefferson County. Plaintiffs' Jefferson County ("J") Exhibit 01.

There are eight (8) State District Courts in Jefferson County. Black residents are concentrated in the

Central and South Eastern portions of Jefferson County. J-04, p. 2, Map of Proposed Districts. Evidence was introduced that two (2) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1.

11. Lubbock County. Plaintiffs are proceeding on behalf of the combined Black and Hispanic voters in Lubbock County. There is a total population of 211,651 in Lubbock County. The Black population of Lubbock County is 15,780 (7.5%), while the Hispanic population is 41,428 (19.6%). There are 150,714 people of voting age, with 9,590 (6.4%) voting age Black residents and 22,934 (15.2%) voting age Hispanic residents. The combined minority voting age population is 32,524 (21.6%). Plaintiffs' Lubbock County ("L") Exhibit 01.

There are six (6) State District Courts in the Lubbock Crosby County area. The combined minority population is concentrated in the North Eastern, Eastern and

South Eastern sections of those Counties. L-04, p. 2, Map of Proposed Districts. Evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) Black voting age population was possible. *Id.* at 1. This remains true when Plaintiffs controlled for voting age population of non-United States citizens of Spanish origin. Plaintiffs' Exhibit L-11.

12. Ector County. Plaintiffs are proceeding on behalf of combined Black and Hispanic voters in Ector County. The total population of Ector County is 115,374. Its Black population is 5,154 (4.5%) and the Hispanic population is 24,831 (21.5%). There are 79,516 people of voting age. The voting age population by minorities consists of 3,255 (4.1%) Black voters and 14,147 (17.8%) Hispanic voters for a combined minority voting age population of 17,402 (21.9%). Plaintiffs' Ector County ("E") Exhibit 01.

There are four (4) State District Courts in Ector County. Minority residents are concentrated in the Southwest

section of the County. E-04, p. 2, Map of Proposed Districts. Evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) minority voting age population was possible. *Id.* at 1. It is possible to draw a district of combined minority population of voting age even if non-citizen voting age Hispanics are eliminated from the calculations. Plaintiffs' Exhibit E-13.

13. Midland County. Plaintiffs proceed on behalf of Black and Hispanic voters combined in Midland County. Midland County has a total population of 82,636. Its Black population is 7,119 (8.6%) and its Hispanic population is 12,323 (14.9%). There are 57,789 people of voting age, 4,484 (7.8%) voting age Black voters and 6,893 (11.9%) voting age Hispanic voters. The combined voting age population is 11,377 (19.7%). Plaintiffs' Midland County ("M") Exhibit 01.

There are three (3) State District Court in Midland County. Black residents are concentrated largely in the Northeastern, East Central and Southeastern sections of Midland County. M-04, p. 2, Map of Proposed Districts. Evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) combined voting age population was possible. *Id.* at 1. It is possible to draw a district in which the combined minority population is in the majority even if non-citizen Hispanics of voting age are excluded. Plaintiffs' Exhibit M-15.

Political Cohesion and White Bloc Voting

14. Racially polarized voting indicates that the group prefers candidates of a particular race.[15] *Monroe v. City of Woodville*, No. 88-4433, slip op. at 5573, (5th Cir. Aug. 30, 1989). Political cohesion, on the other hand, implies that the group generally unites behind a single political "platform" of common goals and common means by which to achieve them. *Id.* at 5573.

The inquiry into political cohesiveness is not to be made prior to and apart from a study of polarized voting. The Supreme Court made clear that "[t]he purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether

[15] The Supreme Court in *Gingles* adopted the definition of racial polarization offered by Dr. Bernard Grofman, appellees' expert. Dr. Grofman explained that racial polarization "'exists where there is a consistent relationship between [the] race of the voter and the way in which the voter votes' ... or to put it differently, where 'black voters and white voters vote differently.'" *Gingles*, 478 U.S. at 53 n.21.

whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56.

15. Plaintiffs presented testimony of two experts. Dr. Richard Engstrom ("Dr. Engstrom") testified only about Harris and Dallas Counties. Dr. Robert Brischetto ("Dr. Brischetto") testified concerning all other counties at issue in this case.

16. Harris County

a. Dr. Richard Engstrom testified on behalf of Plaintiffs and Plaintiff-Intervenors in Harris County. Dr. Engstrom used 1980 U.S. Census counts of total Black population by precinct to analyze 1980 election results. For 1982, 1984, 1986 and 1988, Dr. Engstrom used precinct voter registration estimates supplied by Dr. Richard Murray, a non-testifying expert. Plaintiffs' Exhibit P-I H-08. Dr. Engstrom verified or "matched" the reliability of Dr. Murray's estimates and the 1980 Census counts by comparing Dr. Murray's estimates to an Hispanic precinct voter

registration list compiled by the Secretary of State. Testimony of Dr. Richard Engstrom. Dr. Engstrom testified that there was "a very good match."

b. Dr. Engstrom analyzed 17 general elections in Harris County. He calculated "r" values[16] between 0.798 and 0.880 for the 17 elections analyzed.[17] Plaintiffs' Exhibit P-I H-01 pp. 1-2. Dr. Engstrom's regression analysis shows a strong relationship between race and voting patterns in Harris County. *See* Appendix A to this opinion ("Appendix"), Plaintiffs' Exhibit P-I H-01 pp. 1-2. All of his correlation coefficients[18] exceed .79 (79%) except one. *Id.*, *see* section

[16] The "r" value describes the relationship between the racial composition of a precinct and the number of votes a particular candidate receives. Testimony of Dr. Engstrom. To put it another way, "how consistently a vote for Black candidate changes as the racial composition of the precinct changes." *Id.*

[17] "Crucial to the validity of regression analysis are the values for 'r' and 'r[squared]', which measure the strength of the correlation and linear relationship of the variables being examined, in this case the race of the voter and the candidate he supports." *Overton*, 871 F.2d at 539

[18] The "r" value is also referred to as the "correlation coefficient" or "Pearson r." A positive Pearson r shows that as the percentage of minorities in a precinct increases, so does the support that a minority candidate receives. A Pearson r of -1 shows the opposite, as the

on Bivariate Regression under the column heading of Correlation Coefficient. Dr. Robert Brischetto generally testified with regard to the counties in issue other than Dallas and Harris County, that a Pearson r of 1 (100%) would show perfect correlation. He further testified that social scientists consider anything over 0.50 (50%) as showing a strong correlation.

c. Further, each Pearson r is accompanied by an estimate of the likelihood that the estimate would occur by chance. This figure is known as the significance level. In the regression analyses for Harris County, as well as all the counties in issue, the significance level was much smaller than the generally accepted level of extremely high significance of .05.[19] Testimony of Dr. Robert Brischetto; Testimony of Dr.

percentage of minorities in a precinct increases, there is decrease in the support that a minority candidate receives. A Pearson r of 0 shows that there is no relationship between the racial/ethnic composition of precincts and voting behavior.

[19] A significance level of .01, for example, means that the Pearson r in question would have occurred by chance only one time out of one hundred.

Richard Engstrom. Dr. Engstrom testified that the probability that the Harris County estimates would have occurred by chance were less than 1 out of 10,000.

d. The lowest r squared for these analyses is approximately .62 (62%). This describes the percentage of the variance in voting behavior explained by race/ethnicity. Testimony of Dr. Robert Brischetto.[20] Squaring these "r" values[21] to calculate coefficients of determination demonstrates in the present case that race explains at least 62% of the variance in voting in all 17 elections relied on by Plaintiffs and Plaintiff-Intervenors.

e. The one judicial race that did not exceed the 79% figure actually had a negative correlation. This race involved Mamie Proctor, a Black candidate running on a

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[20] For example, if a Pearson r is .5, then 25% (5 x 5 or r squared) of the variance in voting behavior is explained by race/ethnicity.

[21] This figure is also known as the coefficient of determination. It is the coefficient of correlation or Pearson r multiplied by itself. It shows how much or little "noise" there is around the line of correlation or, in other words, "the percentage of variance in the vote that is explained by the race of the voters." *Overton*, 871 F.2d at 539 n.11.

Republican ticket against Henry Schuble, an Anglo, for State Family Court 245. In the 1986 Proctor race, the correlation coefficient was -0.836 (approx. -84%). *Id.* at 1; Plaintiffs' Exhibit P-I H-10 p. 2. This reflects that, as the percentage of Blacks in voting precincts increases, Proctor's support decreased. In other words, even though Ms. Proctor is Black, she did not receive the support of the Black community. Hence, she was not the preferred candidate of Black voters in Harris County. Dr. Engstrom testified on cross examination that the "candidate of choice" was the candidate who received the majority of the black vote, not necessarily the Black candidate.

f. When Dr. Engstrom controlled for Hispanic votes, Dr. Engstrom's regression analysis shows that Blacks consistently gave more than 97% of their vote to their preferred candidate. *Id.*, *see* last two columns.

g. Dr. Engstrom's homogenous precinct analysis corroborates the results of his regression analysis. *See*

Appendix A, Plaintiffs' Exhibit P-I H-01 pp. 1-2. It shows that Black voters in Harris County gave more than 96% of their votes to the preferred candidate of Black voters in every election except Proctor's. Ms. Proctor received 5% of the Black vote.

h. Finally, in all counties including Harris County, Plaintiffs "weighted" precinct data in order to account for variations in the population size of the various precincts. Testimony of Dr. Richard Engstrom; *Overton*, *supra*, at 537. Dr. Engstrom testified that on the basis of his analysis the Black community in Harris County votes cohesively in general elections for State District Court Judges.

i. Harris County Defendant-Intervenor Judge Sharolyn Wood ("Judge Wood"), attacks Plaintiffs and Plaintiff-Intervenor's proof on the following grounds: (1) Dr. Engstrom failed to establish the reliability of his data set; (2) absentee votes were not allocated to election returns; (3) the analysis does not reflect the effect of the influx of the

Vietnamese population into Harris County and traditionally Black precincts; and (4) the analysis fails to reflect black candidate successes in primary elections or uncontested races.

j. In reference to the reliability of the data set, Judge Wood points to numbers on Dr. Murray's printouts that have been written over, struck out or crossed through, pencil notations and other marks. This Court finds the data set to be reliable.

k. In response to the other concerns, Dr. Engstrom testified that: (1) primary elections were not examined in Harris County because those elections were not filtering out the candidate of choice of Black voters; (2) uncontested races do not assist researchers in their analysis; (3) the appropriate comparison in Voting Rights cases is Black and non-Black; (4) while he did not specifically control for Asian Americans, they would be included in the percentage of non-Black votes; and (5) the range of absentee votes between 1980 and 1986 never exceeded 3.2% to 7.6%,

while in 1988 that range rose to approximately 13.6% per precinct. This Court finds that Dr. Engstrom's testimony adequately addresses these concerns. The Court further finds that the lack of control for absentee votes and Asian Americans does not significantly affect Dr. Engstrom's analysis.

l. The State Defendant and Defendant-Intervenors argue that it is a candidate's political party and the strength of straight ticket party voting that determines the result of any election contest and not the difference between the preferred candidates of whites and minorities. In support of this argument, Defendants and Defendant-Intervenors point to the 1982 and 1986 Democratic sweep for judicial candidates in Harris County and a similar Republican sweep in the years 1984 and 1988. All Defendants attribute this phenomenon to top of the ticket straight party voting.[22]

[22] In 1982, Senator Lloyd Bentsen was the lead Democratic candidate on the ballot. In 1986, Governor Mark White represented the top of the ticket Democratic candidate. In Presidential election years 1984 and 1988,

m. Correlation and regression can also prove the third *Gingles* prong by showing that a white bloc vote exists. This is shown when the percentage of votes received by the minority candidate decreases as the percentage of minority persons of voting age decreases. In other words, the minority candidate receives fewer votes as the percentage of non-minority persons in a precinct increases. Regression results estimate the percentage of non-minority support for minority candidates, otherwise known as the Anglo cross over vote. Plaintiffs' Exhibit P-I H-01 pp. 1-2. column 4. This is also referred to as the Y intercept.

n. Dr. Engstrom calculated Y intercepts for the Black preferred candidate between 29 and 39 percent for the 17 elections analyzed. The highest Y intercept was 53.6%, but this percentage of the non-Black vote was for the non-preferred candidate Mamie Proctor. The highest percentage

President Ronald Reagan and President George Bush, respectively, were the top Republican candidates.

of Anglo cross over votes received by the preferred candidate of Black voters was 39 percent. *See* 1986 race Carl Walker, Jr., Black Democrat against George Godwin; *Id.* This is corroborated by a 40% Anglo cross over vote figure calculated for the same race in homogenous precincts of 90% or more non-Black population. *Id.* at column 1. Mr. Walker was the Black preferred candidate and won. Plaintiffs' Exhibit P-I H10. Two other Black preferred candidates drawing opposition in the 1986 elections lost their elections even though they had identical Black community support. These two candidates had slightly less Anglo cross over vote. Plaintiffs' Exhibit P-I H-01 pp. 1-2, column 1. Five other Black preferred candidates drawing opposition in what appears to be county-wide elections lost in the 1986 elections. Plaintiffs' Exhibit P-I H-10.[23] This analysis demonstrates that an Anglo bloc vote exists. Dr. Engstrom testified that the

[23] These candidates are: Bonnie Fitch, Raymond Fisher, Francis Williams, Sheila Jackson Lee, and Cheryl Irvin.

Anglo or white bloc vote in Harris County is sufficiently strong to generally defeat the choice of the Black community. This Court agrees.

o. Plaintiff-Intervenor Sheila Jackson Lee also testified about political cohesiveness among Black voters in Harris County. Ms. Lee has lived in Harris County approximately 11 years and has been a candidate in several judicial elections. Plaintiffs' Exhibit P-I H-01 pp. 1-2; Exhibit P-I H-10 pp. 1-3. She had many different endorsements and campaign strategies but still lost. She testified that her loss was attributable to not getting enough white votes.

p. This testimony was supported by the deposition summaries of Thomas Routt, Weldon Berry, Francis Williams and Bonnie Fitch.

q. Defendant-Intervenor Wood presented the testimony of Judge Mark Davidson. As a hobby, Judge Davidson analyzes the results of judicial elections in Harris

County. His testimony concerned his views on what he has termed "discretionary judicial voters" ("DJV").[24] Judge Davidson testified that 15% of the vote in judicial elections in Harris County were DJV's. The remaining 85% split roughly evenly between straight Democrat party and straight Republican party voting. Based upon his analysis, Judge Davidson believes that race and ethnicity are irrelevant to voting behavior as it relates to the judiciary in Harris County. He opines that DJV's determine the outcome of judicial contests in Harris County and the DJV vote can somewhat be garnered by various campaign factors. While this Court finds Judge Davidson to be a credible witness, under controlling law, the Court finds that his testimony is irrelevant.

r. The Court further finds Defendant-Intervenor Wood's contention that the Black preferred candidate lost their respective judicial race due to their failure to win the

[24] He defines DJC's as voters who vote for at least one judicial candidate of one party and at least one of the other party. DJV's are also referred to as "swing" voters.

Harris County bar or preference poll or to obtain the Gay Political Caucus ("GPC"), endorsement to be legally incompetent.

s. The complete data set used by Dr. Engstrom was used by Defendant's expert, Dr. Delbert Taebel for his analysis of Harris County. Dr. Taebel did not weight his precinct data to account for variations in population size of various precincts in Harris County or any other county at issue.

t. Dr. Taebel analyzed 23 District Court general elections where minorities opposed white candidates in Harris County. State Defendants' Exhibit D-05 pp. 9, 13, 29, 33, 37, 41, 45, 53, 61, 81, 85, 89, 93, 97, 101, 105, 137, 141, 145, 161, 165, 173 & 177. Black and white voters voted differently in all 23 District Court elections. *Id.* The Black preferred candidate won only six (6) times. The Black preferred candidate won seven (7) of 11 County Court general elections. Id. D-05 pp. 1, 5, 17, 21, 25, 109, 113, 117, 121,

125 & 129. Blacks and whites voted differently in each of those elections. Id. Dr. Taebel also analyzed nine (9) judicial primary elections; seven (7) for District Court posts and two (2) County Court posts. *Id.* D-05 pp. 49, 57, 65, 73, 77, 145, 157, 169 & 181. The Black preferred candidate won six (6) of the nine (9) primaries. Interestingly enough, each preferred candidate winning the primary lost the general election. *Id.* D-05 pp. 61, 69, 81, 153, 161 & 173.

17. Dallas County.

a. Dr. Engstrom used the same data set for his analysis of Dallas County. However, the 1980 Census counts were updated in 1982 and 1988 by the Dallas County Elections Office by reconfiguring precincts according to the changes made in precinct lines. Testimony of Dr. Richard Engstrom. Dr. Engstrom accepted the updates census counts for 1982 and 1988 as reliable. *Id.* In the intervening years of 1984 and 1986, Dr. Engstrom looked for precincts that

combined or split and aggravated precinct counts for those precincts. *Id.*

b. Dr. Engstrom analyzed seven (7) general elections for State District Court where Blacks opposed Anglos between 1980 and 1988 in Dallas County. The correlation coefficient or "r" values exceed 0.864 (86%) for six (6) of the seven (7) elections analyzed. *See* Appendix A, Plaintiffs' Exhibit D-02. Dr. Engstrom's homogenous precinct analysis and regression analysis shows a strong relationship between race and voting patterns in Dallas County. *Id.*, *see* columns 2 & 3. Dr. Engstrom testified that the significance level was much smaller than the generally accepted level of extremely high significance of .05 and that the probability that the Dallas County estimates would have occurred by chance were less than 1 out of 10,000.

c. The lowest r squared for these analyses is approximately .75 (75%). This figure is found from multiplying the r value by itself for Jesse Oliver's judicial

race in 1988. This coefficient of determination demonstrates that race explains at least 75% of the variance in voting in at least six (6) of the seven (7) elections relied on by Plaintiffs and Plaintiff-Intervenors.

d. Plaintiffs' Exhibit D-02 further shows that in five (5) of the seven (7) elections as the percentage of Blacks increased in precincts, so did Black support for the preferred candidate of Black voters. *See* Homogeneous precinct analysis, column 2.

e. Bivariate regression analysis reflects a negative correlation for Carolyn Wright's judicial race in 1986. Judge Wright is a Black who ran on the Republican ticket. She received -1.5% of the Black vote and 71.7% of the non-Black vote. Plaintiffs' Exhibit D-02, columns 4 & 5. The correlation coefficient was -0.872 (-87%). *Id.*, column 3. This reflects that, as the percentage of Blacks in voting precincts increases Judge Wright's support decreased. In other words, even though Ms. Wright is Black, she did not

receive the support of the Black community. Hence, she was not the preferred candidate of Black voters in Dallas County. Black voters also failed to support Judge Baraka, a Black Republican candidate in 1984.

f. When Dr. Engstrom controlled for Hispanic votes, Dr. Engstrom's regression analysis shows that Blacks consistently gave more than 97% of their vote to their preferred candidate. *Id.*, *see* last two columns. Dr. Engstrom's analyses shows that Blacks are politically cohesive in general elections for State District Court in Dallas County.

g. His analysis is confirmed by the testimony of Plaintiff-Intervenors' Joan Winn White, Fred Tinsely, H. Ron White and Jesse Oliver. The Exhibits reflect that each Plaintiff-Intervenor received 97% or better of the Black homogenous precincts and at least 83% of the votes in precincts with Black population of 50% to 90%. Plaintiffs' Exhibit P-I D-16 - D-22a.

h. Plaintiffs calculated the percentage of votes for the black preferred candidate, Jesse Oliver, and his white opponent, Brown, in each of the proposed hypothetical single member districts. Plaintiffs' Exhibit D-12a. They repeated this procedure for the judicial races involving the Black preferred candidates in Plaintiffs' Exhibit D-02 and Nathan Brin (an Anglo preferred by Black voters in Dallas County). Plaintiffs' Exhibits D-12b, 12c & 12d. In each instance, the Black community's preferred candidate received a majority of votes in each predominately Black hypothetical district.

i. Defendant-Intervenor Judge Harold Entz ("Judge Entz"), attacks Plaintiffs and Plaintiff-Intervenors evidence on the ground that: (1) the data is based on total population and not voting age registered voters; (2) the analysis does not reflect changes in the distribution of population over time as a result of growth of Dallas suburbs and geographic dispersal of minorities; (3) Dr. Engstrom did not control for absentee or Oriental votes; (4) there is a

stronger association between partisan affiliation and success than there is between race and success; and (5) the analysis shows what happened but not why it happened. In support of his fourth attack, Judge Entz argues that five of the seven elections analyzed involved Black candidates who are the candidate of choice, while all seven involved Democratic candidates who were the Black preferred candidate of choice. Thus, Judge Entz concludes that political party is a better predictor of the Black preferred candidate and that candidate is a victim of partisan politics not discriminatory vote dilution.

j. Dr. Engstrom testified that: (1) he was never given precinct data by race and voting age registered voters; and (2) the range of support for the Democrat candidates between 1980 and 1986 varied 10 to 17 percentage points. Thus, Dr. Engstrom concluded that something other than just straight party voting is going on in judicial elections.

k. Dr. Dan Wiser's testimony confirms Dr. Engstrom's results. Dr. Wiser's data set was based on 1980 Census data, Dallas County election returns and Dallas County precinct data adjusted for changes in precincts. Precincts that split were reconstructed by estimating the part of the precinct that shifted to another and apportioning the registered vote based on the shift and past history. Testimony of Dr. Dan Wiser. The adjusted data was checked against the 1986 Justice Department submissions. Id. Plaintiffs' Exhibit P-I D-11. Ninety eight percent (98%) of the vote in homogeneous precincts of 90% Black voters went to the Black preferred candidate. Plaintiffs' Exhibit P-I D-11, D-16 through D-23a. At least 83% of the Black community vote supported the Black preferred candidate in homogenous precincts of between 50% and 90% Black. *Id.*

l. Dr. Wiser calculates that the Asian community only comprised approximately 2.6% of the total Dallas County population as of 1985. Plaintiffs' Exhibit P-I D-03.

He testified that the best estimate of the growth of the Asian community between 1985 and the present is supplied by the Bureau of Census. Plaintiffs' Exhibit P-I D-02. He believes there has only been a growth of approximately 3% between 1985 and 1988 and does not agree with estimates of Asian leaders in Dallas County.

m. Plaintiffs and Plaintiff-Intervenors established the third *Gingles* prong by showing that a white bloc vote exists. The Y intercepts calculated by Dr. Engstrom for the Black preferred candidate ranged between 29 and 39 percent for the seven elections analyzed. Plaintiffs' Exhibit D-02. The highest Y intercepts were 61.8% and 71.7% for Judges Baraka and Wright respectively, the non-preferred candidates. *Id.* The highest percentage of Anglo cross over votes received by the preferred candidate of Black voters was approximately 39 percent. *Id.*, 1980 race involving Joan Winn White. There are 197 precincts in Dallas County that

are 90% or greater white population. Plaintiffs' Exhibit P-I D-06 & 07.

n. This is corroborated by Dr. Engstrom's homogenous precinct analysis and Dr. Wiser's analysis. *Id.* at column 1. This analysis demonstrates that an Anglo bloc vote exists. The Court finds on the basis of the exhibits and testimony of Dr. Engstrom and Dr. Wiser that the Anglo or white bloc vote in Dallas County is sufficiently strong to generally defeat the choice of the Black community.

o. Dr. Anthony Champagne testified that judicial elections in Dallas County were characterized by strong partisan affiliation rather than racially polarized voting. Dr. Champagne analyzed contested District Court general elections between 1976 and 1988. Plaintiffs' Exhibit P-I D-06-A. Dr. Champagne bases his opinion on the steady increase of Republican victories in Dallas County over time. Plaintiffs' Exhibit P-I D-07-A pp. 1-2. Only seven (7) of the contested general elections analyzed involved Blacks opposing

white candidates. Plaintiffs' Exhibit P-I D-09-A p. 1. No Black candidate running on the Democratic ticket won a general election. Two Black candidates running as Republicans won. *Id.* at 1. The Court noted, *supra*, that it was the non-Black vote that gave rise to the success of these two candidates. *See* Finding of Fact 17.e.

p. Dr. Taebel analyzed nine judicial elections in which Blacks opposed Anglos. In eight of the nine, Blacks and Anglos voted differently. State Defendants Exhibit D-06 pp. 1, 13, 17, 21, 37, 69, 73, 81 & 89; *see* Appendix B, Plaintiffs' re-Evaluation of Dr. Taebel's Reports ("Re-Evaluation") for Dallas County p. 1. The Black preferred candidate won only once. *Id.* This sole victory arose in the 1988 Republican primary. *Id.* The Black choice won only five (5) of the other twelve primary and general District Court and Appellate Court races analyzed. *Id.*; Plaintiffs' Re-Evaluation p. 2.

18. Tarrant County.

a. Dr. Robert Brischetto ("Dr. Brischetto") testified concerning on behalf of Plaintiffs and Plaintiff-Intervenors in Tarrant County and the remaining counties at issue. He weighted his analysis in all remaining counties. Dr. Brischetto used Black population data by precinct from the 1980 Census for thirty four (34) precincts in Tarrant County where precinct lines had not changed. He analyzed four (4) elections in which Blacks opposed Anglos in Tarrant County (three judicial elections and the 1988 Democratic Primary). *See* Appendix A, Plaintiffs' Exhibit Ta-02.

b. In Tarrant County and other contested counties where there was a large representation of three ethnic/racial groups, Dr. Brischetto used multiple regression analysis. Dr. Brischetto testified that this approach shows the effect of the percentage of Hispanics in precincts, for example, upon the votes received by a minority candidate, when accounting for the effect of the percentage of Hispanics. The statistical calculation that shows the effect is called the "Partial r."

c. Dr. Brischetto calculated "Partial r" values of -87%, -80% and 90% respectively for the three judicial elections analyzed. Plaintiffs' Exhibit Ta-02. There was a negative correlation in the 1986 Salvant - Drago race and the 1986 Sturns - Goldsmith race. Salvant and Sturns were Black candidates running as Republicans. They did not receive the support of the Black community. *Id.* Approximately 93% of the Black voters in precincts analyzed voted for Drago, while approximately 85% of Black voters voted for Goldsmith. *Id.* The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto. Dr. Brischetto's regression analysis shows a strong relationship between race and voting patterns in Tarrant County. The strength of the correlation is dependent on the size of the number not on the positive or negative value assigned to it. The negative correlation in the Salvant and Sturns races merely reflects that as the percentage

of Blacks in voting precincts increases, the support for Salvant and Sturns decreased.

d. The lowest r squared for these analyses is approximately 64% for the 1986 race for Criminal District Court Place 1. Race explains at least 64% of the variance in voting in all elections relied on by Plaintiffs and Plaintiff-Intervenors in Tarrant County.

e. Plaintiffs' Exhibit Ta-02 further analyzes the Jesse Jackson Democratic Presidential Primary in 1988. The Partial r for Jesse Jackson was 98%. Although the Jackson race was not a judicial election, its analysis corroborates the judicial elections analyzed. However, Dr. Brischetto testified that he would reach the same conclusions without considering the Jackson contest.

f. Dr. Brischetto's homogenous precinct analysis corroborates the results of his regression analysis. Plaintiffs' Exhibit Ta-02. It shows that Black voters in Tarrant County

gave more than 89% of their votes to the preferred candidate of Black voters in every election analyzed.

g. Dr. Brischetto also recompiled and reanalyzed Dr. Taebel's work concerning Tarrant County. Plaintiffs' Exhibit Ta-10. Plaintiffs' Exhibit Ta-10 compiles all of Dr. Taebel's analysis of countywide elections for judicial positions when Blacks opposed Anglos. Dr. Taebel also found negative correlation of -63% and -60% in the Salvant and Sturns elections respectively. *Id.* While these correlation figures are not as high as those found by Dr. Brischetto, they still reflect a strong correlation. *See* Finding of Fact 16.b last sentence.

h. Dr. Taebel used bivariate regression in his analysis. Dr. Brischetto is of the opinion that had Dr. Taebel used multivariate analysis, his correlation estimates would have been more precise. Further, Dr. Brischetto believes that the r values would have been higher, because the analysis would have eliminated the effect of Hispanics. While Dr. Brischetto did not agree with Dr. Taebel's statistical

methodology, he reviewed Dr. Taebel's work because Dr. Taebel's data set was more complete.

i. This Court finds, on the basis of all of Dr. Brischetto's analysis, the Black community in Tarrant County votes cohesively in general elections for State District Court Judges.

j. The Court further finds that the Anglo bloc vote in Tarrant County is sufficiently strong to defeat the minority community's preferred candidate. In the three general elections analyzed, the preferred candidate of Black voters lost every time. This is true even though each of the Black preferred candidates had a sizeable percent of Anglo cross over votes. Plaintiffs' Exhibits' Ta-02; Ta-10. The Y intercept reflects that Anglo support for the Black preferred candidates was between 42% and 49%. *Id.* Ta-02.

k. The testimony of Plaintiff and sitting District Judge Maryellen Hicks corroborates this analysis. Judge Hicks is Black. She testified that the only time she ran

against an Anglo in a countywide judicial election she lost. Plaintiffs' Exhibit Ta-10, County Criminal Court Place 1. She feels that she lost because she could not convince Anglos to vote for her. She also believes that she could not win if she had Anglo opposition because of the Anglo vote.

l. Judge Hicks testified that implementation of single member districts in Tarrant County had immediate effects. Before the districts went into effect, only two Blacks had been elected to School Trustee positions. Since single member districts were implemented two Blacks and one Hispanic have consistently been Trustees. Two Blacks and one Hispanic also took office on the Fort Worth City Council as a result of single member districts being implemented for that body. Further, after single member districts were established for State Representative offices, two minorities were elected to the Texas House of Representatives.[25]

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[25] After the lines were redrawn in 1982, one minority has been elected.

m. In the five primary and general judicial elections involving Black candidates analyzed by Dr. Taebel, the Black choice won only once. State Defendants Exhibit D-39 pp. 1, 29, 33, 37 & 57; *See* Appendix B, Re-Evaluation for Tarrant County p. 1. It is clear that Blacks and Anglos voted differently in these races. *Id.* In District Court general elections that did not have a Black candidate, the candidate preferred by Black voters won three (3) of five (5) times. *Id.* D-39 pp. 13, 17, 21, 25 & 61; Re-Evaluation at 1-2. In three other judicial general elections the candidate of choice of the Black community won all three times. *Id.* D-39 pp. 9, 49 & 65; Re-Evaluation at 2. Two of the three were Appellate Court elections, while the third involved the County Court at Law. *Id.* The candidate of choice also won all three primary judicial elections analyzed by Dr. Taebel. *Id.* D-39 pp. 5, 41 & 49.

19. Bexar County.

a. Dr. Brischetto based his analysis of Bexar County on Spanish surnamed registered voter data by precinct from the office of the Secretary of State of Texas. Dr. Brischetto testified that this data was the closest measure of actual registration data by precinct. Dr. Brischetto used bivariate regression analysis in Bexar County because of the very small Black population in the County.

b. He analyzed six (6) general elections from 1980 to 1988 in which Hispanics opposed Anglos. *See* Appendix A, Plaintiffs' Exhibit B-02. He calculated "r" values for Hispanic preferred candidates between 86% and 88%. *Id.* His regression analysis shows a strong relationship between race and voting patterns in Bexar County. In all but one race, as the percentage of Hispanics increased, support for the Hispanic preferred candidate increased. Dr. Brischetto testified that the probability that correlation of this size would

happen by chance was much smaller than the generally accepted level of .05.[26]

c. In the 1982 Barrera - Stohlhandski race, the Hispanic candidate, Roy Barrera, Jr. running as a Republican, received very little Hispanic support. the correlation coefficient for Mr. Barrera was -80%. *Id.* As the percentage of Hispanics in voting precincts increased, Barrera's support decreased. Barrera received approximately 17% of the Hispanic vote. *Id.* He was not the preferred candidate of Hispanic voters in Bexar County.

d. The lowest r squared for these analyses is approximately 64% for Mr. Stohlhandski, an Anglo running as a Democrat in the 1982 Barrera - Stohlhandski race. The highest r squared was 77% for the 1986 Cisneros - Peeples race. This demonstrates in Bexar County that race explains

[26] The significance level for each election is .0000. Plaintiffs' Exhibit B-02. Dr. Brischetto testified that there was practically no [or zero] probability that these correlations would happen by chance.

at least 64% to 77% of the variance in voting in all six elections.

e. Dr. Brischetto's background and homogeneous precinct analysis confirm the fact that Hispanics are politically cohesive in Bexar County. Dr. Brischetto lives in Bexar County and analyzed election behavior there in a Section 2 case involving the San Antonio River Authority. Plaintiffs' Exhibit B-16. There he found polarized voting along racial and ethnic lines in a nonpartisan election involving low profile campaigns. Dr. Brischetto's homogeneous precinct analysis shows that Hispanic voters in Bexar County gave 73% to 93% of their votes to the preferred candidate of Hispanic voters in every election.

f. Dr. Brischetto controlled for absentee votes in 1988 elections based on allocated data from the Bexar County Elections Administrator. He testified that the additional data did not change his conclusions.

g. Plaintiffs presented evidence from four hypothetical districts carved out of existing precincts for each of the six elections analyzed. Plaintiffs' Exhibits B-12a - 12e. Almost always, the Hispanic candidate who actually lost at-large would have won if he had run from a hypothetical majority Hispanic district. In one case, the 1988 Republican primary between Arellano and White, the Hispanic candidate won in only three of the four hypothetical districts. *Id.* B-12e.

h. In the 1988 Arellano - White Republican primary for the 150th District Court, Arellano ran as an appointed incumbent. White, an Anglo, decided late in the campaign that he did not want to run for office. It was too late to withdraw, but he endorsed his opponent Arellano. White nevertheless won. Adam Serrata testified in his deposition that this was a classic example of polarized voting. Deposition Summary of Adam Serrata ("Serrata Depo.").

i. Other testimony suggests the same conclusion. Judge Anthony Ferro testified in his deposition that he ran for County Court at Law four times in Bexar County. He won two races were he did not have Anglo opposition. Deposition Summary of Anthony Ferro ("Ferro Depo.") at 1. Both Messrs. Serrata and Ferro testified that it is not possible to get elected in Bexar County to the position of District Judge without Anglo support. *Id.*; Serrata Depo.

j. Dr. Brischetto further concluded that the Anglo bloc vote in Bexar County is sufficiently strong to defeat the Hispanic community's preferred candidate. In the six elections analyzed, the preferred candidate of Hispanic voters won only once. *See* 1988 Mireles - Bowles race. The Y intercept reflects that non-Hispanic support for the Hispanic preferred candidates was between 18% and 35%. It is not surprising that the one Hispanic candidate of choice who won also received the highest percent of Anglo cross over votes.

k. Judge Ferro testified that he has only been able to get elected when he did not have an Anglo opponent. Ferro Depo. Judge Paul Canales testified that voters in Bexar County pay attention to the race/ethnicity of candidates in judicial elections.

l. The effect of fairly drawn single member districts has had a positive effect on minority election results in Bexar County. Immediately after the creation of single member districts in *White v. Regester*, Hispanics were elected to the Texas House of Representatives. Further, immediately after the City Council implemented single member districts, the number of minorities on the San Antonio City Council increased. Serrata Depo.; Ferro Depo.

m. Whites and Hispanics voted differently in 28 of the 29 judicial elections involving Hispanic candidates in Bexar County. State Defendants Exhibit D-07 pp. 2-5 & 7-28; *see* Appendix B, Re-Evaluation for Bexar County p. 1-2. In the twelve general elections analyzed by Dr. Taebel,

the Hispanic preferred candidates won three (3) times. *Id.* D-07 pp. 4, 5, 7, 15-16, 18-21 & 25-28; Re-Evaluation at 1. Only one of those was a District Court election. *Id.* D-07 at 5. The Hispanic choice won six (6) out of 18 primary elections. *Id.* Re-Evaluation at 1-2.

20. Travis County.

a. Dr. Brischetto analyzed three (3) 1988 countywide judicial elections in Travis County: one primary election for the 345th District Court and two County Court at Law general elections. Dr. Brischetto testified that there has only been one Hispanic - Anglo District Court election between 1978 and 1988. In that race, the Anglo won. Plaintiffs' Exhibit Tr-11; Testimony of Jim Coronado. Mr. David Richards testified that the Republican party is significant in Travis County. Hence, Mr. Richards concluded that the Democratic Primary is the true testing ground for opposed candidates in judicial elections.

b. Dr. Brischetto used Hispanic population data by precinct from the 1980 Census reconfigured to 1988 precinct boundaries. He based his polarization and homogenous precinct analysis on total population figures for Blacks, Hispanics and Anglos in approximately 178 precincts (virtually all of them) in the County. Amalia Rodriguez Mendoza, the Travis County Registrar of Voters, provided the data.

c. Dr. Brischetto's multivariate or multiple regression analysis shows that the Hispanic community in Travis County is politically cohesive, when the effect of the Black vote is considered. Dr. Brischetto calculated "Partial r" values of 84%, 85% and 90% respectively for the three judicial elections analyzed. *See* Appendix A, Plaintiffs' Exhibit Tr-02. The Hispanic preferred candidate received at least 77% of the Hispanic vote in one election[27], 93% in the

[27] The 1988 County Court at Law race between Castro Kennedy and Hughes. Castro is the Hispanic preferred candidate. Plaintiffs' Exhibit Tr-02.

Democratic Primary election and 95 in the Garcia - Phillips race. *Id.* The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto. Dr. Brischetto's regression analysis shows a strong relationship between race and voting patterns in Travis County.

d. The homogenous precinct analysis for Travis County establishes a similar pattern. Plaintiffs' Exhibit Ta-02. It shows that Hispanic voters gave more than 63% and as high as 90% of their votes to the Hispanic preferred candidate.

e. Dr. Brischetto also reanalyzed the same three elections using bivariate regression analysis based upon voter registration data. *See* Appendix A, Plaintiffs' Exhibit Tr-19. These correlation figures are very close to those calculated using multivariate analysis, and clearly reflect strong correlation. *See* Finding of Fact 16.b. last sentence. With either data set, Dr. Brischetto's analysis shows that as

the percentage of Hispanics in precincts increase, so does support for the Hispanic preferred candidate. The r squared figures all exceed approximately 64%.

f. The Hispanic preferred candidates took the majority of the votes from Plaintiffs' hypothetical districts even though they lost countywide. Plaintiffs' Exhibit Tr-12.

g. The State Defendants were concerned that Plaintiff's did not analyze Statewide judicial or legislative elections. *See* Cross examination of Jim Coronado; Cross examination of Dr. Brischetto. Dr. Brischetto testified that Plaintiffs focused on local elections when that data was available and these elections were not reached in Plaintiffs' hierarchy of priority. He further testified that the elections analyzed were the closest in nature to District Court elections. Dr. Brischetto felt that once he had three elections he could determine a sufficient pattern. This Court agrees.[28]

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[28] *Gingles* itself relied on only analysis of three elections in Senate District 22 (1978, 1980 & 1982) and House District 21 (1978, 1980 & 1982). *Gingles*, 478 U.S. at Appendix A.

h. The State Defendants attack Dr. Brischetto's analysis on the ground that he did not take into account: (1) absentee voting; and (2) the number of non-United States citizens, Blacks or Anglos with Spanish surnamed in Travis County.

i. Dr. Brischetto controlled for absentee votes in 1988 elections in Bexar County. He testified that Bexar County had the highest absentee voting than anywhere in the State. He concluded in his Bexar County analysis that absentee voting did not change his conclusions. *See* Findings of Fact 19.f. This Court finds that the results would not be significantly different in Travis County.

j. Spanish surname counts were based on persons who identified themselves in Census counts as being of Spanish origin. While the Court recognizes that the Census definition of Spanish origin includes many parallel ethnic backgrounds, this Court finds that the probability of overlap of Black and/or White voters is very slight.

k. Finally, the State Defendants claim that the analyses of the Democratic Primary between Judge Gallardo (the Hispanic preferred candidate) and McCown is misleading. Witnesses for the State Defendants testified that Judge Gallardo lost because he was a bad judge. Depositions of Becky Beaver & Fernando Rodriguez; Testimony of David Richards. While this may be true, under controlling law, it is the correlation between the race of the voter and the selection of certain candidates that is crucial to this Court's inquiry. *Gingles*, 478 U.S. at 63.

l. The Court further finds that the Anglo bloc vote in Travis County is sufficiently strong to defeat the minority community's preferred candidate. The preferred candidate of Hispanic voters lost each election analyzed. Two of the Hispanic preferred candidates received approximately one third Anglo cross over votes. Plaintiffs' Exhibits' Tr-02; Tr-19. The other candidate received only approximately 14% Anglo cross over votes. *Id.* Tr-02.

m. In each of the hypothetical districts, the candidate of choice of the Hispanic community received the most votes; in two districts the candidate of choice received a majority.

n. Dr. Taebel analyzed the same three elections analyzed by Plaintiffs' expert. State Defendants Exhibit D-08; *See* Appendix B, Re-Evaluation for Travis County p. 1. His analysis confirms that in these three races whites and Hispanics voted differently and the Hispanic preferred candidate lost each time. Id. D-08 pp. 33, 37 & 41. The Hispanic preferred candidate fared better in Appellate elections winning one primary runoff and two general elections.. *Id.* D-08 pp. 25, 29 & 45. Hispanic and white voters did not vote differently in these three election contests but did so in the 1984 and 1986 Democratic primary for County Court numbers 1 and 7. Id. D-08 pp. 33 & 41.

21. Jefferson County.

a. Dr. Brischetto used Black population data by precinct from the 1980 Census for all of his analysis in Jefferson County. He testified that population had changed very little in Jefferson County. Plaintiffs' Post Trial Brief at 95. Only those precincts that retained unchanged boundary lines were used in his analysis.

b. He analyzed five (5) Democratic primary elections, two (2) Democratic primary runoffs and the 1988 Presidential Democratic primary. *See* Appendix A, Plaintiffs' Exhibit J-02 pp. 1-2. Four of the five primaries analyzed involved Justice of the Peace contests. The fifth was for a County Court at Law post. Dr. Taebel did not analyze any of these elections. State Defendants' Exhibit D-09. Each of the Justice of the Peace election precincts covered at least an entire city which are the largest urban areas of the County. Precinct 1 covers the City of Beaumont, Texas. Precinct 2 covers the City of Port Arthur, Texas. Tom Hanna testified in his Deposition that running for office from these precincts

is equivalent to running at large from the two cities. Dr. Brischetto testified that there were no primary or general elections for District Court seats that pitted Black against Anglo.

c. Dr. Brischetto used multivariate regression analysis in his examination of Jefferson County separating out the effect of the Hispanic vote. He calculated "Partial r" values between 66% and 97% for the judicial primaries and runoff elections analyzed. *Id.* The partial r for the Black preferred candidate in the Democratic Presidential Primary, Jesse Jackson, was 97%. *Id.* The likelihood that the estimates would occur by change (significance level) was much smaller than .05. *Id.* Dr. Brischetto's regression analysis shows a strong relationship between race and voting patterns in Jefferson County. The Black preferred candidate received a clear majority of Black community support in at least five of the seven judicial contests analyzed. *Id.*, multivariate and homogeneous analysis for 1972 to 1978. In the 1982 primary

for Justice of the Peace, Precinct 1, Place 2, the Black preferred candidate Cannon received approximately 51% of the Black community vote, while two opponents split the remaining 49%.

d. In one instance, the Black preferred candidate did not receive a majority of the Black community vote. In the 1986 Democratic Primary for Justice of the Peace, Precinct 1, Place 2, the Black preferred candidate, Wilmer Roberts, only received 47% of the Black vote (40% in homogeneous precincts). The other 53% (60% in homogeneous precincts) was split between four candidates. John Paul Davis, a Black attorney from Jefferson Country, testified in his Deposition that he supported the white candidate because she was the most liberal at the time he made his choice and Mr. Roberts announced late in the race.

e. The r squared figures range from 44% for one race (1972 runoff) to 94% for three races (1978 & 1982 judicial primaries and 1988 Presidential primary). It is clear

from Dr. Brischetto's analysis of voting patterns in Jefferson County that as the percentage of Blacks increase in a precinct, the percentage of support for the Black preferred candidate increases.

f. Dr. Brischetto examined the votes cast in a hypothetical district for the 1978 Democratic Primary between Mr. Davis and an Anglo opponent. The analysis shows that Davis received more votes in each precinct and a majority of the vote in the district. Plaintiffs' Exhibit J-09.

g. State Defendants argue that the three races analyzed in 1982, 1986 and 1988 either show no racial polarization or a victory for the Black preferred candidate. This Court disagrees. As the Court discussed, *supra*, the Black preferred candidate was supported by a majority of the Black community in the 1982 Democratic Primary. *See* Finding of Fact 21.c. With reference to the 1986 Democratic Primary, the Court finds that the State Defendants' evidence is not conclusive that the Black community either would not

have cohesively supported Wilmer Roberts had he announced earlier or that the Black community cohesively supported some other candidate. Plaintiffs' Exhibit J-02; Finding of Fact 21.d. The Court further finds that while Jesse Jackson may have carried Jefferson County in the 1988 Presidential Primary, that fact alone is a far cry from whether the Black preferred candidate is successful in Jefferson County.

h. State Defendants further point to the 1984 Democratic Primary between John Paul Davis and Donald Floyd, both of whom are Black, to demonstrate that the Black community is not politically cohesive in Jefferson County. While Mr. Floyd won the primary and the election, Defendants did not demonstrate that the Black community split their vote or failed to support one candidate over another.

i. This Court finds on the basis of the foregoing discussion that the Black community in Jefferson County votes cohesively in judicial elections.

j. In at least five of the seven elections analyzed it is clear that blacks and whites voted differently and the preferred candidate of Black voters lost every time. The Black communities candidate of choice received 25% to 41% of the Anglo cross over vote in election years 1972 and 1974. The percentage dropped thereafter to a low of 2% for Wilmer Roberts in 1986 and a range of 7% to 10% for the other two judicial races. Plaintiffs' Exhibit' J-02. Although the Black preferred candidate received 70% to 93% of the Black community vote in five of the seven elections analyzed they still lost countywide.

k. The Court finds that the Anglo bloc vote in Jefferson County is sufficiently strong to defeat the minority community's preferred candidate.

l. No Black attorney has run for the position of District Judge in Jefferson County. Deposition Summary of John Paul Davis. Mr. Davis feels that Black lawyers do not

run for the office because of the high probability of defeat. *Id.*

m. Implementation of single member legislative and Commissioner's Court districts resulted in the election of Black preferred candidates to those positions. Deposition Summary of Thomas Hanna.

22. Lubbock County

a. Dr. Brischetto used population data from the 1980 Census precinct boundaries for his analysis in Lubbock County. He initially based his review on 30 of 76 precincts which had not changed between 1980 and the relevant elections analyzed. The analyzed additional precincts that he was able to reconfigure by use of Census block maps.[29]

b. Dr. Brischetto relied on appellate judicial contests. He testified that no relevant local judicial contests

[29] He analyzed 48 of the 76 total precincts in the 1986 primary, 44 of 76 in the 1986 runoff, 48 in the 1986 general election and 47 in the 1988 general election. *See* Plaintiffs' Post Trial Brief at 109 n.55.

involved a minority opposed by an Anglo candidate. He further testified that he did not analyze local Justice of the Peace races because the Justice of the Peace precincts were not at least as large as a major city. He analyzed two (2) Supreme Court general elections, two (2) Democratic primary elections and two (2) Democratic primary runoffs. See Appendix A, Plaintiffs' Exhibit L-02, pp. 1-3.

c. Dr. Brischetto used bivariate, multivariate regression and homogeneous precinct analysis in his examination of Lubbock County. The bivariate analysis produced correlation coefficients in excess of 87% with a corresponding r square figure of 76%. *Id.* He used multiple regression analysis to show that Blacks and Hispanics vote together. This analysis revealed that the two groups favored the same candidates in each election. *Id.* The lowest partial r calculated for Hispanic voters was 78% in the 1986 Democratic Runoff for Supreme Court place 4. The lowest partial r for Black voters was 56% in the 1986 Democratic

Primary for the same Court prior to the runoff election. The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. *Id.* Dr. Brischetto's regression and homogeneous precinct analysis shows a strong relationship between race/ethnicity and voting patterns in Lubbock County. The combined minority preferred candidate received a clear majority of combined minority community support in each election analyzed. *Id.*

d. It is clear from Dr. Brischetto's analysis of voting patterns in Lubbock County that as the percentage of minorities increase in a precinct, the percentage of support for the minority preferred candidate increases. This Court finds that Blacks and Hispanics are cohesive as a group in Lubbock County judicial elections.

e. Maria Luisa Mercado, a Hispanic attorney from Lubbock County, testified that Blacks and Hispanics work together in the County on many significant issues. Deposition Summary of Maria Luisa Mercado ("Mercado Depo.").

f. The State Defendants point to the 1984 race for Justice of the Peace between Sedeno, a Hispanic candidate running as a Democrat, against a Black Republican candidate, McKinley Shephard to illustrate that Blacks and Hispanics do not vote cohesively as a group. The Black boxes voted for Mr. Shephard. Mercado Depo. at 2. Dr. Brischetto testified that this race was not analyzed because the Justice of the Peace precinct in question split the City in half. "It did not include a large majority of the County or a large metropolitan area." Testimony of Dr. Robert Brischetto. This Court finds that the Sedeno - Shephard race does not illustrate that Blacks and Hispanics do not vote cohesively in at-large judicial elections. The Court further finds that Blacks and Hispanics opposing each other says less about the collective cohesiveness of the two groups when either opposes an Anglo.[30]

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[30] State Defendants further point to Hispanic - Black state representative races in Lubbock County in 1984 and 1986.

g. Minorities and whites voted differently in each election analyzed. However, the preferred minority candidate won on two of six occasions. Plaintiffs' Exhibit L-02, p. 2, 1986 Primary for Court of Criminal Appeals, Place 1 and 1986 Runoff. In one of those two races, the minority preferred candidate received 46% of the Anglo cross over votes from homogeneous white precincts of 90% to 100% white population. *Id.*, 1986 Runoff. The minority communities candidate of choice received 39%, 40% and 41% of the Anglo cross over vote, respectively, in three other elections and still lost. *Id.*, 1986 General Election, 1988 General Election and 1986 Democratic Primary, Supreme Court, Place 4, respectively. The Court finds that the Anglo bloc vote in Lubbock County is sufficiently strong to defeat the minority community's preferred candidate.

h. Defendants argue that Justice Gonzalez may possibly have received more Anglo votes in the 1986 Democratic Runoff with 36% than either of his three

opponents, assuming the remaining 64% of the Anglo votes were evenly split. Defendants conclude on that basis that Anglos did not vote overwhelmingly against Justice Gonzalez. This Court disagrees. Assuming arguendo that Defendants assumption is correct, the Court finds that Anglo's did overwhelmingly vote against Justice Gonzalez even if they did not vote overwhelmingly for a different candidate.

i. Dr. Brischetto testified concerning some countywide elections in *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984). His conclusions in *Jones* corroborate his testimony in this case.

j. Ms. Mercado testified that Black and Hispanic candidates have not been successful in at large elections. Mercado Depo. She testified that she carried all minority boxes and zero Anglo boxes in her 1978 bid for City Council. *Id.* Blacks and Hispanics have been successful running for School Board and County Commissioner's positions after the implementation of single member districts. *Id.*

k. Dr. Taebel only analyzed two of the same Appellate Court contests analyzed by Dr. Brischetto. State Defendants' Exhibit D-10 pp. 17 & 25. In both, minorities and whites voted differently and the minority choice lost. Similar results were obtained in two County Court at Law General Elections analyzed by Dr. Taebel. *Id.* D-10 pp. 5 & 9. However, in those two races there was no minority candidate. *See* Appendix B, Re-Evaluation of Lubbock County.

23. Ector County

a. Dr. Brischetto used population data from the 1980 Census precinct boundaries to analyze 24 of the 31 total precincts in Ector County which had not changed between 1980 and the relevant elections analyzed. As in Lubbock County, he relied on appellate judicial contests. He analyzed two (2) Supreme Court General Elections and two (2) Democratic Primary Elections. *See* Appendix A, Plaintiffs' Exhibit E-02, pp. 1-2. He testified that no County or District

Court contests involved a minority opposed by an Anglo candidate.

b. Dr. Brischetto used the same statistical analysis used in Lubbock County. Bivariate analysis was used to separate the white and minority votes. Testimony of Dr. Robert Brischetto. Multivariate analysis was used to separate the Black and Hispanic vote. *Id.* The bivariate analysis produced correlation coefficients in excess of 78% with a corresponding r square figure of 61%. Plaintiffs' Exhibit E-02, pp. 1-2. Multiple regression analysis shows that Blacks and Hispanics vote together. This analysis revealed that the two groups favored the same candidates in each election. *Id.* The lowest partial r calculated for Hispanic voters was 46% in the 1986 Democratic Primary for Supreme Court Place 4. The lowest partial r for Black voters was 60% in the 1988 General Election for Supreme Court, Place 3. The likelihood that the estimates would occur by chance (significance level)

was much smaller than .05. Testimony of Dr. Robert Brischetto.

c. A clear majority of the combined minority community supported the preferred minority candidate in each election analyzed. Even in the race for Supreme Court, Place 4, Justice Gonzalez, received 42% of the Hispanic vote and 65% of the Black community vote. *Id.* Dr. Brischetto's regression and homogeneous precinct analysis shows a strong relationship between race/ethnicity and voting patterns in Ector County. The lowest level of combined support is reflected as 50% in the Democratic Primary for Supreme Court, Place 4. *Id.*, Homogeneous precinct analysis, p. 2. Dr. Brischetto attributes the lack of stronger minority group cohesiveness in that race to the fact that one of the candidates in the Primary was from Ector County. *Id.*, Candidate Gibson. However, in the General Elections for 1986 and 1988, homogeneous precincts of 80% or more combined

minority gave more than 80% of their vote to the minority preferred candidate.

d. It is clear from Dr. Brischetto's analysis of voting patterns in Ector County that as the percentage of minorities increase in a precinct, the percentage of support for the minority preferred candidate increases. This Court finds that Blacks and Hispanics are cohesive as a group in Ector County judicial elections.

e. Minorities and whites voted differently in each election analyzed. Minorities supported the minority preferred candidates in much greater percentages than Anglo voters. The preferred minority candidate won only one race analyzed. See Plaintiffs' Exhibit E-02, p. 2, 1986 Primary for Court of Criminal Appeals, Place 1.

f. Minorities have been elected to Justice of the Peace and County Commissioner's positions from predominately minority precincts. Deposition Summary of Lawrence Leo Barber ("Barber Depo.")

g. Dr. Taebel's analysis of the same two Appellate Court contests confirmed Dr. Brischetto's analysis. State Defendants' Exhibit D-11 pp. 21 & 37. In both, minorities and whites voted differently and the minority choice lost. Dr. Taebel further analyzed five (5) General Election judicial contests that did not involve positing an Anglo against a minority. *Id.* pp. 5, 9, 13, 29 & 33. Minorities and whites voted differently and the minority preferred candidate lost in three of the five. *See* Appendix B, Re-Evaluation of Ector County.

24. Midland County

a. Dr. Brischetto based his analysis on population data from the 1980 Census. He analyzed 11 of the 36 total precincts for 1986 and 10 of 36 for 1988 that had boundaries that had not changed. He was also able to reconfigure boundaries for 22 precincts in 1986 and 23 in 1988. Testimony of Dr. Robert Brischetto. He relied on appellate races and one Justice of the Peace race since there have been no

local countywide election contests in which minorities opposed Anglos. The Justice of the Peace race encompassed the entire City of Midland. Testimony of Aquilla Watson. He analyzed three elections in total. *See* Appendix A, Plaintiffs' Exhibit M-02. Dr. Taebel did not analyze the Justice of the Peace contest.

b. Dr. Brischetto used bivariate regression analysis in Midland County. The bivariate analysis produced correlation coefficients in excess of 89% with a corresponding r square figure of 79%. *Id.* Better than 85% of the combined minority voted for the minority preferred candidate in each race. *Id.* The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto. Dr. Brischetto's regression and homogeneous precinct analysis shows a strong relationship between race/ethnicity and voting patterns in Midland County.

c. It is clear from Dr. Brischetto's analysis of voting patterns in Midland County that as the percentage of minorities increase in a precinct, the percentage of support for the minority preferred candidate increases. This Court finds that Blacks and Hispanics are cohesive as a group in Midland County judicial elections.

d. It is further clear that minorities and whites voted differently in each election analyzed. Minorities supported the minority preferred candidate in much greater percentages than Anglo voters. The preferred minority candidate lost each race analyzed despite the large percentages of combined minority support. *Id.*

e. This analysis is supported by Dr. Brischetto's analysis and testimony in *Lulac v. Midland ISD*, 648 F.Supp. 596, 600 (W.D. Tex. 1986), *aff'd*, 812 F.2d 1491 (5th Cir. 1987), *vacated* 829 F.2d. 546. Plaintiffs' Exhibit M-05.

f. Aquilla Watson testified that she received very few Anglo votes. She only carried four (4) of the thirty-six

(36) precincts. Only one of the four included some Anglo cross over votes. Testimony of Aquilla Watson. Minorities have been elected to the School Board and County Commissioner's Court from predominately single member districts. *Id.*

g. Dr. Taebel analyzed four (4) judicial contests in which a minority candidate ran against one or more white candidates. State Defendants' Exhibit D-12 pp. 9, 21, 25 & 29. Minorities and whites voted differently and the minority choice lost in the two General Elections analyzed. *Id.* pp. 25 & 29. The minority choice also lost in both primary elections, but there is some indication that minorities and some white voters voted the same. *Id.* pp. 9 & 21. *See* Appendix B, Re-Evaluation of Midland County.

ACCESS TO THE POLITICAL PROCESS

History of Discrimination

25. The effect of past discrimination against Blacks and Hispanics in areas such as education, employment and

health in most of the Counties in question is either well chronicled or undisputed. *See, e.g., Lulac v. Midland ISD*, 648 F.Supp. 596, 600 (W.D. Tex. 1986), *aff'd*, 812 F.2d 1491 (5th Cir. 1987), *vacated* 829 F.2d 546; *Campos v. City of Baytown*, 840 F.2d 1240, 1243 (5th Cir. 1988), *reh'g denied*, 849 F.2d 1240, *cert. denied*, ___ U.S. ___ (1989); *Lipscomb v. Jonsson*, 459 F.2d 335 (5th Cir. 1972); *Graves v. Barnes*, 343 F.Supp. 704, 725 n.15, 730-34 (W.D. Tex. 1972), *rev'd in part and remanded sub nom, White v. Regester*, 412 U.S. 755 (1973), *on remand*, 378 F.Supp. 640, 644 (1974); *Terrazas v. Clements*, 581 F.Supp. 1329, 1334 (N.D. Tex. 1984); *United States v. Texas Ed. Agcy., Etc.*, 564 F.2d 162, 163 (5th Cir. 1977), *reh'g denied*, 579 F.2d 910 (1978), *cert. denied*, 443 U.S. 915 (1979); *Blackshear Residents Organization v. Housing Auth. of City of Austin*, 347 F.Supp. 1138 (W.D. Tex. 1971); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984); *United States v. CRUCIAL*, 722 F.2d 1183, 1185 (5th Cir. 1983). *See also*

Plaintiffs and Plaintiff-Intervenors Exhibits reflecting social stratification.

26. This history touched upon many aspects of the lives of minorities in the Counties in question including their access to and participation in the democratic system governing this State and their socio-economic status. "The administration of justice in Texas was overwhelmingly dominated by Anglo males in 1968, and the overall pattern [had] changed very little" by 1978. Plaintiffs' General Exhibit ("Gen") 02, *Texas: The State of Civil Rights (Ten Years Later, 1968-1978)*, A Report of the Texas Advisory Committee to the United States Commission on Civil Rights at 22 (1980); *City of Port Arthur, Texas v. United States, et al.*, 517 F.Supp. 987, 1020 (D.D.C. 1981)(three judge court), *aff'd*, 459 U.S. 159 (1982).

Enhancement

27. Candidates for District Court must run for a specific Judicial District Court seat. This is equivalent to a

numbered post system.[31] District Judges must be nominated in the primary by a majority of the votes.

> "This provision insures that essentially white voting majorities have a 'second shot' at [minority] candidates who have failed to muster a majority of the votes in the first election. Time and again, in election after election, minority candidates win a plurality in the first election, only to lose the runoff in highly racially polarized voting."

Testimony of Dr. Charles Cotrell at 491, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate (94th Cong. 1st Sess.) S. 407, S. 903, S. 1409, S. 1443 (1975); Plaintiffs' Exhibit Gen.-03 at 491. Finally, the size of at least five of the nine target counties further enhance the problems that minority candidates face when they seek office. Plaintiffs' Exhibit Tr-15 shows that Harris, Dallas, Tarrant, Bexar and Travis

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[31] "A numbered-post system requires a candidate to declare for a particular seat on a [G]overnmental body. The candidate then runs only against other candidates who have declared for that position. The voters then have one vote for that seat. The system prevents the use of bullet, or single shot, voting. *Campos*, 840 F.2d at 1242 n.1 [*citing Gingles*, 478 U.S. 38-9 nn. 5 & 6].

Counties have very large populations. *See also* Plaintiffs' Exhibit P-I D-4.

Slating

28. Slating has been defined as the creation of a package or slate of candidates, before filing for office, by an organization with sufficient strength to make the election merely a stamp of approval of the pre-ordained candidate group. *Overton*, 871 F.2d at 534. Dr. Wiser depicted the Republican Party in Dallas County as a white-dominant slating group. This Court finds that such characterization is at odds with the governing law and facts of this case. Plaintiffs and Plaintiff-Intervenors did not present evidence of slating in Harris, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties.

Racial Appeals

29. Plaintiff-Intervenor for Dallas County, Joan Winn White, argued that racial appeals were injected into her 1980 judicial race against Charles Ben Howell when an

advertisement he ran made reference to his opponent (Ms. White) as the "affirmative action appointee." Plaintiffs Exhibit P-I D-30. The Court notes and Ms. White testified that the term "affirmative action" is used in reference to sex as well as race. The Court finds that there is nothing inherently racist about referring to an affirmative action judicial appointment.

30. Plaintiff-Intervenors from Dallas County also argue that racial appeals were inserted into the 1986 election between Royce West and John Vance and the 1988 Republican Primary between Larry Baraka and Brook Busby. This Court agrees. In the West - Vance race, Mr. Vance made a racial appeal by inserting his opponent's picture in a campaign advertisement financed by Mr. Vance's campaign. In the Baraka - Busby race, Ms. Busby campaigned with literature pointing out that her opponent was a Black Muslim. Plaintiffs and Plaintiff-Intervenors did not present evidence of racial appeals in the remaining Counties at issue.

Electoral Success

31. Since 1980, seventeen Blacks have run for State District Court Judge in Harris County. Only 2 (approx. 12%) won. Plaintiffs' Exhibit H 07. Seven Blacks have opposed Anglos in District Court General Elections in Dallas County and won only two elections (29%). Plaintiffs' Exhibit D-09. However, neither of these candidates was the candidate of choice of the Black community. Only one Hispanic candidate of choice won in Bexar County in six Hispanic - Anglo elections. Plaintiffs' Exhibit B-11. The Black community's preferred choice achieved the District Court bench only once out of three elections when Blacks ran against Anglos in Tarrant County. Plaintiffs' Exhibit Ta-07. Only one Hispanic candidate ever ran against an Anglo for a District Judge seat in Travis County. The Hispanic candidate lost. Plaintiffs' Exhibit Tr-11. No minority candidate has run for the office of District Court Judge in Jefferson County. John Paul Davis testified at his deposition that the at-large system

discourages eligible Black attorneys from running because the chance of success is so slim. At least three Black attorneys sought appointment to the District Court bench. Deposition Summary of John Paul Davis ("Davis Depo."). Similar testimony was elicited on behalf of Plaintiffs in Lubbock County. Mercado Depo. No minority candidate has run for District Court Judge in Lubbock, Ector or Midland County.

32. State Defendants argue that the eligible pool of minority lawyers, rather than eligible minority voters, is the appropriate reference point for evaluating the extent of electoral success. State Plaintiffs' Exhibit D-04. The Court notes that the two cases relied upon by the State involve Title VII issues and do not address the relevant statistical pool in a § 2 case. *See Richmond v. J.A. Croson Co.*, 109 S.Ct. 706, 725-26 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115, 2121-22 (1989). State Defendants recognize that the pool of eligible lawyers is small, due in part, to historical discrimination. The Court finds that even if there is some

relationship between the low number of minority judges and the number of eligible minority lawyers, that fact does not explain why well qualified eligible minority lawyers lose judicial elections.

Responsiveness

33. This Court cannot find anything in the record to suggest a lack of responsiveness on the part of Judges in any of the Counties in question to the particularized needs of members of the minority community.

Tenuousness

34. Several reasons were offered for the maintenance of the at-large system. State Defendants and Defendant-Intervenor Wood argued that (1) judges elected from smaller districts would be more susceptible to undue influence by organized crime; (2) changes in the current system would result in costly administrative changes for District Clerk's offices; and (3) the system of specialized courts in some counties would disenfranchise all voters rights

to elect judges with jurisdiction over some matters. Plaintiff-Intervenors, HLA, allege that the at large scheme was adopted with the intention to discriminate against Black voters in violation of the Fourteenth Amendment to the United States Constitution.

35. Chief Justice of the Texas Supreme Court, Thomas Phillips, testified that the purpose of Article 5, Section 7a(i) of the Texas Constitution was to create the Judicial Districts Board which could equalize the dockets of District Judges. To further that goal, Article 5, Section 7a(i) requires that judges be elected from districts no smaller than a county. Apparently, the rationale for such provision is that District Judges should not be responsible to voters over an area smaller than area where they have primary jurisdiction.

36. Plaintiff-Intervenors offered the Deposition summary of Senator Craig Washington in support of their claim that discriminatory intent was the focus of the legislative deliberations surrounding the passage of Section

7a(i). The Court notes that Senator Washington sat on the Conference Committee and signed the Conference Committee Report recommending the adoption of the Senate Joint Resolution containing the exact language of Section 7a(i), Tex. S.J. Res. 14, 69th Leg. (1985). *See* Defendant Intervenor Wood's Exhibit 59. Subsequently, Senator Washington on the Senator floor voted for the adoption of S.J. Res. 14. *Id.* The Court further notes that three Hispanic Senators voted in favor of S.J. 14: Senator Barrientos, Senator Truan and Senator Uribe.

37. Plaintiffs and Plaintiff-Intervenors have the burden to establish that the at-large system is maintained on a tenuous basis as a pretext for discrimination. *Overton*, 871 F.2d at 535. While the Court does not find that the present system is maintained on a tenuous basis as a pretext for discrimination, the Court is not persuaded that the reasons offered for its continuation are compelling.

38. Under a single member scheme or some other scheme Judges may be made responsible to voters over an area no smaller or larger than the area where they have primary jurisdiction. This Court finds no reason why all Judges cannot exercise general jurisdiction over their geographic area of responsibility. The Court further finds that administrative functions and jury selection could continue to be done on a countywide basis.

39. Our legislative body has seen fit in the past to create in some counties specialty courts. In the mind of this Court this is wrong. Judges of civil dockets or judges of criminal dockets have equal access to legislation and published opinions. They are not intellectually inferior to judges who hear civil, criminal and domestic cases. The body of law is large, but is handled capably and well by most judges in this State who hear all types of litigation. Lawyers specialize. Judges are capable of rendering fair, honest and

just decisions without concentrating in one narrow field of law.

STATE DEFENDANTS' ANALYSIS

General

40. State Defendants argue that the Supreme Courts incorporation in *Gingles*, of the Senate Report accompanying the 1982 Amendment to § 2, signals a return to the Supreme Court's pre-*Gingles* analysis in *Whitcomb v. Chavis*, 403 U.S. 124 (1971). In *Whitcomb*, the Supreme Court rejected a racial vote dilution challenge to an at-large system for electing state legislators, essentially on the ground that partisan preference best accounted for electoral outcomes in Marion County, Indiana. The Court in *Whitcomb* concluded that there was no indication in the record of that case that Blacks were being denied access to the political system.

41. This Court is not convinced that the State Defendants are making the correct call. In any event, the Court finds that this Court's analysis of the Senate factors

applicable to the present case point to the continual effects of historical discrimination hindering the ability of minorities to participate in the political process.

42. Next, State Defendants are of the opinion that there are really two questions before this Court, depending on what electoral stage is being analyzed. At the primary stage the question is whether the minority candidate of choice in the Democratic Primary is prevented more often than not by a Democratic white bloc vote from being the party's nominee in the General Election. State Defendants' Post Trial Brief at 9. At the General Election stage the question becomes whether there is a pattern of substantial desertion from the Democratic party by white voters to vote for a Republican candidate, thereby denying victory to the minority candidate of choice. *Id.* at 10. This Court finds such a distinction unimportant. Assuming the first two elements of the *Gingles* test are met and the Senate factors point to vote dilution, it is unimportant whether a white bloc vote, which is sufficient -

absent special circumstances - usually to defeat the minority's preferred candidate, takes place at one election stage, both stages or by Democrats or Republicans.

43. The issue of partisan voting was before the Supreme Court in *Gingles*. The Court had no difficulty concluding that voting polarized along racial, not partisan, lines. *Gingles*, 478 U.S. at 61-62. Party affiliation is simply irrelevant under the controlling law. Further, "the addition of irrelevant variables [to regression or statistical analysis] distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report." Id. at 64.

Statistical

44. The complete data set used by Dr. Engstrom in Harris and Dallas Counties was used by Defendant's expert, Dr. Taebel for his analysis of those Counties. Dr. Taebel's data set for analysis in the other seven counties appears to be very similar. He did drop homogeneous precincts from his analysis if there was more than a ten percent (10%) change

in precinct boundary census data since the 1980 Census counts. Dr. Taebel analyzed both primary and General Elections in not only minority - Anglo contests, but also minority Republican candidates opposed to white candidates and white - white contests. He also analyzed elections in which the minority preferred candidate ran unopposed. This Court finds that unopposed election contests and white versus white contests are not germane in this Circuit to this Court's analysis. *Westwego Citizens For Better Government v. Westwego*, 872 F.2d 1201, 1208 n. 7 (5th Cir. 1989); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), *reh'g denied*, 849 F.2d 1240, *cert. denied*, __ U.S. _ (1989); *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987).

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 18 U.S.C. § 1432 and 42 U.S.C. § 1973C.

Venue is proper in this District pursuant to 28 U.S.C. § 1400(b).

2. It is settled in this Circuit that § 2 of the Voting Rights Act applies to the judiciary. *Chisom v. Roemer*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, *sub nom*, *Chisom v. Edwards*, 109 S.Ct. 310 (1989) (*Chisom* I). However, it is clear that at-large judicial elections may not be considered *per se* violative of § 2. Furthermore, the Court holds that § 2 applies equally as well to State District Judicial elections as it does to appellate elections.[32]

Standard Under The Voting Rights Act

3. In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court construed Section 2 of the Voting Rights Act, as amended, to

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[32] State Defendants argue that State District Judgeships cannot be analogized to legislative or appellate posts, which by nature are characterized by collegial decision making. While the Court recognizes that State District Judges function as sole, independent decision makers, the Court concludes that there is no indication that *Chisom*'s extension of § 2 to judicial elections was meant to be limited to collegial judicial bodies.

require a three-part threshold test to demonstrate a violation of Section 2. The minority group must be able to demonstrate: that (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district ("*Gingles* 1"); (2) it is politically cohesive ("*Gingles* 2"); and (3) the white majority votes sufficiently as a bloc to enable it -in the absence of special circumstances - usually to defeat the minority's preferred candidate ("*Gingles* 3"). *Gingles*, 478 U.S. at 50-52. Failure to establish any one of the three threshold criteria is fatal to Plaintiffs' case. *Overton*, 871 F.2d at 538.

4. However, Plaintiffs do not achieve victory by satisfying the three *Gingles* factors alone. *Monroe v. City of Woodville*, No. 88-4433, slip op. at 5571, (5th Cir. Aug. 30, 1989). Instead, Plaintiffs must prove under the totality of the circumstances that as a result[33] of the challenged at large

[33] In *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d (1973), the Supreme Court applied what has come to be known as the "results test" indicating that a violation of § 2 could be proved by showing discriminatory *effect* alone. (Emphasis added.) Congress made clear by the 1982 amendment to § 2 that the "results test" is the relevant legal standard to be applied by this Court.

system Plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice. *Id.* at 5571; *Gingles*, 478 U.S. at 44. The Senate Report which accompanied the 1982 amendment to § 2 specifies certain objective factors which typically may be relevant to a § 2 claim.[34] S. Rep. No. 97-417 (1982) (here-

[34] Typical factors include:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of [P]laintiffs' evidence to establish a violation are:

inafter S. Rep.). This list of factors is neither comprehensive nor exclusive.[35] "There is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles*, *supra*, at 45 [*quoting* S.Rep. at 29].

5. *Gingles*, 1 requires proof that the minority population is sufficiently large and geographically compact to constitute a majority in a single member district. *Gingles*, *supra*, at 50. To satisfy the *Gingles* 1 requirement, Plaintiffs must be able to draw a single member district in which a majority of the voting age population is minority. *Overton*, 871 F.2d at 535. Plaintiffs have satisfied this requirement with regard to all of the nine target counties at issue in this

---

"whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"whether the policy underlying the state or political subdivision's use of such ... voting practice or procedure is tenuous." S.Rep. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. Admin.News 177, 206-207.

[35] S. Rep. No. 97-417 (1982).

case. The minority population is sufficiently large and geographically compact to constitute a majority in at least one single member district; Black, Hispanic or combined, in each of the nine counties at issue in this case.

6. Evidence of racially polarized voting "is the linchpin of a ection 2 vote dilution claim," *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496, 499 (5th Cir. 1987) and is relevant to establishing two of the three elements set forth in the *Gingles* decision - the minority groups political cohesiveness (*Gingles* 2) and the ability of the white majority usually to defeat the minority's preferred candidate (*Gingles* 3). *Westwego Citizens For Better Government v. Westwego*, 872 F.2d 1201, 1207 (5th Cir. 1989) [*citing Gingles*, *supra*, at 56]. These factors are usually established by statistical evidence of racially polarized voting by the voters in the relevant political unit. *Campos v. City of Baytown*, 840 F.2d 1240, 1243 (5th Cir. 1988), *reh'g denied*, 849 F.2d 1240, *cert. denied*, ___ U.S. __ (1989).

7. In analyzing statistical data, the best available data for estimating the voting behavior of various groups in the electorate would come from exit polls conducted upon a random sample of voters surveyed as they leave the polling place on election day, but such evidence was not introduced at trial. *See Chisom v. Roemer*, No. 86-4057, slip op. at 11 (E.D. La. Sep. 13, 1989) (*Chisom* II); Defendant-Intervenor Wood's Ex. 40. The best available data for estimating the participation of various groups in the electorate is sign-in data contained in the official records of registered voters. *Chisom* II, slip op. at 12. The best indicator of participation is obtained by dividing the number of persons who signed-in to vote by the number of persons in the voting age population. *Id.* at 12.

8. Absent an exit poll, sign-in data and voting age population data, analysts employ the bivariate ecological

regression technique to estimate the voting behavior of various groups in the electorate.[36] *Id.* at 12.

9. For purposes of political cohesiveness and racially polarized voting, examining only those elections that had a minority member as a candidate, is the proper method of analysis. *Campos*, 840 F.2d at 1245. In order to show cohesion, the proper standard is the same as *Gingles*: whether the minority group together votes in a cohesive manner for the minority candidate. *Id.*[37] In counties where Plaintiffs proceed on behalf of a combined minority, if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown. Of course, if one part of the group cannot be expected to vote

---

[36] Like the Court in *Chisom II*, this Court is not convinced that precise correlation between the race of voters and their voting preferences can be made on the basis of the statistical analysis presented. However, no better data is provided, and the Court has given the statistical data considerable weight. *See Chisom II*, slip op. at 13.

[37] The Court in *Campos* rejected the City of Baytown's argument that in order to show cohesion when there are two minorities that make up the minority group, Plaintiffs must show first that Blacks are cohesive, next, that Hispanics are cohesive and finally, that Blacks and Hispanics together are cohesive. *Campos*, 840 F.2d at 1245.

with or does not vote with the other part, the combination is not cohesive. *Id.*

10. In evaluating the statistics necessary for Plaintiffs to prove racial bloc voting, this Court is bound by recent Fifth Circuit authority to consider statistical evidence from judicial elections and from exogenous elections.[38]

11. This Court is satisfied that the statistics relating to exogenous elections in the present case qualify as a sufficiently "local appraisal" to establish some degree of racial bloc voting.

12. This Court concludes under the controlling law that the statistical evidence furnished by the expert witnesses for Plaintiffs and Plaintiff-Intervenors to be legally competent

[38] *See Chisom II*, slip op. at 40; *Citizens for a Better Gretna*, 834 F.2d at 499. "Exogenous" elections are those which overlap the boundaries of the relevant unit. "Exogenous" elections are contrasted with "indigenous" elections which involve only the geographic unit at issue. *Westwego*, 872 F.2d at 1206, n. 10. County-wide elections represent the relevant geographic unit in the present case.

and highly probative. *Gingles*, 478 U.S. at 52-54; *Overton*, 871 F.2d at 537-540.[39]

13. The final determination, however, must be made by an evaluation of the "totality of the circumstances," including the factors listed in the Senate Report. *Westwego*, 872 F.2d at 1206. The Court must determine, on the basis of a "searching, practical evaluation," of past and present reality whether the political process is open to minority voters. *Gingles*, 478 U.S. at 45 [*quoting* S.Rep. at 30, U.S.Code Cong. & Admin.News 1982, p. 208]. Such a determination is dependent on the facts of each case and requires "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 [*quoting Rodgers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982)]. The appraisal in this case must be

[39] Unlike the statistical analysis in *Overton*, Plaintiff and Plaintiff-Intervenors' experts in the present case established confidence levels of statistical significance and used consistent measures of minority voting strength. *Overton*, 871 F.2d at 537-540.

conducted on a district-by-district basis. *Gingles*, *supra*, at 59 n. 28 (the inquiry into the existence of vote dilution is district-specific).

14. This Court recognizes that judicial elections are characterized by less voter interest than high profile candidates receive at the top of the ticket. However, under the controlling law, party affiliation, straight party ticket voting and campaign factors do not constitute legally competent evidence in the present case. This Court rejects the State Defendants' argument that there can be no "functional view of the political process" without taking into account political party as the principal factor affecting such races. The Supreme Court in *Gingles* made clear that it is the difference between choices made by blacks and whites alone and not the reasons why they vote differently that is the central inquiry of § 2. *Gingles*, 478 U.S. 61-62.

15. Congress and the Courts have recognized that "political participation by minorities tends to be depressed

where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Gingles*, 478 U.S. at 69. Congress clearly concluded that provisions such as majority vote requirements, designated posts, and prohibitions against bullet voting could serve to further dilute the voting strength of minorities. *Id.* at 56; *Jones v. City of Lubbock*, 727 F.2d at 383 (finding that majority vote requirement further submerges political minorities).

16. This Court concludes that under the relevant law the at-large system for election State District Judges in the nine target counties interacts with social and historical conditions to cause an inequality in the opportunity enjoyed by black and white voters to elect their preferred candidates. *Gingles*, 478 U.S. at 47.

17. Defendants' lead expert, Dr. Taebel reviewed many selection contests which the Fifth Circuit determined are not germane to Voter Dilution Cases. Dr. Taebel analyzed

races in which Anglos opposed Anglos. *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988). Dr. Taebel also reviewed non-judicial elections.

18. Costly reorganization of the State at-large system of general and specialized Courts and disruption of County administrative duties such as jury selection are not sufficient grounds for maintaining an otherwise flawed system. *Westwego*, 872 F.2d at 1211 [*in reliance on Dillard v. Crenshaw County*, 831 F.2d 246, 250-51 (11th Cir. 1986)].

19. Congress did not contemplate that such considerations would play a role in determining whether there has been a violation of section 2. *Id.* at 1210-11.

20. On the strength of the evidence of racially polarized voting in the context of the "totality of the circumstances" test and considering the substantial evidence presented by Defendants to the contrary, this Court concludes that Plaintiffs have demonstrated a violation of § 2 of the

Voting Rights Act in each of the nine counties in question. *Westwego*, 872 F.2d at 1203 & 1209.

Fourteenth and Fifteenth Amendment Claims

21. Proof of racially discriminatory intent or purpose is required to show a violation under either the Fourteenth or Fifteenth Amendment to the United States Constitution. *Chisom II*, *supra*, at 41 [*citing: Kirksey v. City of Jackson, Miss.*, 663 F.2d 659 (5th Cir. 1981); *Washington v. Davis*, 426 U.S. 229, 239-41 1976)].

22. Proving racial discrimination as the motivating factor in a state legislative body "is often a problematic undertaking." *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985). Proof must be presented that the legislative body as a whole possessed the intent to discriminate. *Id.* at 229-32. It is impossible to conceive that four leading minority members of the State Senate would vote to send an

individiously discriminatory measure affecting the entire state to the voters with their own seal of approval on it.

23. Plaintiffs and Plaintiff-Intervenors failed to prove, as a matter of law, that the present at large system for electing State District Judges in the State of Texas was instituted with the specific intent to dilute, minimize or cancel the voting strength of Black and/or Hispanic voters. Accordingly, the Court is of the opinion that the following Orders are appropriate:

IT IS ORDERED that the present at-large system of electing State District Judges in the counties of Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland violates Plaintiffs' civil rights by unconstitutionally diluting the voting strength of Hispanic and Black electors in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (West Supp. 1989).

IT IS FURTHER ORDERED that Plaintiffs and Plaintiff-Intervenors request to Permanently Enjoin the State

of Texas from calling, holding, supervising or certifying any future elections for State District Judges under the present at large scheme in the target areas is taken under advisement. The Court recognizes the possibility that corrective relief may be available at a later date before future elections for State District Judges take place. *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988).

The Court is hopeful that Governor Clements will include the issue of an alternative State District court election scheme as part of his call of the Special Legislative Session on November 13, 1989. Depending on the progress that is made in the Legislature, if any, prior to January 3, 1990, the Court will thereafter entertain a Restraining Order or Motion to Enjoin future State District Court elections pending the Remedy Phase of this litigation.

IT IS FURTHER ORDERED that the issues of Costs of Court and attorneys fees are expressly reserved until the conclusion of this litigation.

Chief Judge Charles Evans Hughes, in 1936, in an address to the American Law Institute, said:

> How amazing it is that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion upon difficult legal questions! In the highest ranges of thought, in theology, philosophy and science, we find differences of view on the part of the most distinguished experts -- theologians, philosophers, and scientists. The history of scholarship is a record of disagreements. And when we deal with questions dealing with principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty.

This area of the law is not a sphere of icy certainty.

Should the Legislature fail to adopt a satisfactory Remedy in the Special Session (provided Governor Clements includes this matter in his call) this Court will consider the granting of an expedited appeal to the Fifth Circuit to determine whether or not the Declaratory Judgment of this Court was properly made.

SIGNED AND ENTERED this 8th day of November, 1980.

s/s
Lucius D. Bunton
Chief Judge

U.S. Department of Justice Civil Rights Division
Office of the Assistant Attorney General
Washington, D.C. 20530

Nov 5, 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 12060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on October 2, 1990.

We have given careful consideration to the information in your submission, including all information contained in your earlier submission of Chapter 632, which was withdrawn by the state pending a decision by the court *en ban* in *League of United Latin American Citizens v. Clements*, No. 90-8014 (5th Cir. Sept. 28, 1990) and we have considered the information in that opinion, as well as prior court opinions in that case. In addition, we have considered information from the Census, along with comments and information from other sources.

The changes consist of the establishment of fifteen additional district court judgeships, denominated as separate Judicial Districts. Each judgeship is elected at large in the area of the court's jurisdiction, which consists of one or more

counties. Each judgeship is subject to the general requirement in Texas law that nomination for such position requires the obtaining of a majority of the vote in a political primary. Thirteen of these judgeships will have the same geographic jurisdiction as previously existing judgeships. In these cases, the election of judgeships by Judicial District operates as a numbered post requirement, eliminating any possibility of effective single-shot voting.

Our review of more recent materials shows that it is commonly understood among Texas legislators that the discriminatory impact of these features is present in the election of judges. Indeed, the legislative session which produced Chapter 632 (1989) included an address by the Chief Justice of the Texas Supreme Court and legislative committee discussions in which the discriminatory impact of these features was acknowledged. It appears that the proposed method of electing the judicial positions presently before us, which incorporates the very features understood to be discriminatory, took the form it did primarily because of the inability of legislators to reach a consensus regarding an alternative method of selecting judges that would be fair to racial and ethnic minorities.

Accordingly, with regard to the additional judgeships in Dallas, Lubbock, and Tarrant Counties in particular, the evidence clearly indicates that the at-large method of election, even considered in isolation from the numbered post and majority-vote features, produces a discriminatory result proscribed under Section 2 of the Voting Rights Act, 42 U.S.C. 1973c.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia* v. *United States*, 411

U.S. 526 (1973); see also the Procedure for the Administration of Section 5 (28 C.F.R. 51.52). In addition, our guidelines provide that a submitted change may not be precleared if its implementation would lead to a clear violation of Section 2 of the Act. See 28 C.F.R. 51.55. Because we cannot conclude, as we must under the Voting Rights Act, that your burden has been sustained in this instance, and because our view is that use of the at-large election system with numbered posts and majority vote resulting in a clear violation of Section 2, I must, on behalf of the Attorney General, interpose an objection to the voting changes occasioned by Chapter 632, S.B. No. 1379 (1989) and the implementation schedule for those districts.

In reaching this decision, we are not unmindful of the recent decision of the Fifth Circuit Court of Appeals in *League of United Latin American Citizens* v. *Clements*, No. 90-8014 (Sept. 28, 1990) ("*LULAC*") (*en banc*) which held that the Section 2 results standard is not applicable to judicial elections. The *LULAC* court, however, expressly recognized that "Section 5 of the Act applies to state judicial elections" (Slip. op. at 20) and until this matter is clarified further by the courts we see no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the changes to which we have objected continue to be legally unenforceable and should not be implemented in the

November 6, 1990, election. *Clark* v. *Roemer*, No. A-327 (U.S. Nov. 2, 1990) (copy attached). See also 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call George Schneider (202-514-8696), Attorney in the Voting Section.

Sincerely,

/s/ John R. Dunne
Assistant Attorney General
Civil Rights Division

(3) (2)

Nos. 90-813 and 90-974

Supreme Court U.S.
FILED
DEC 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

vs.

JIM MATTOX, *et al.*,
Respondents.

*****

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Petitioners,

vs.

JIM MATTOX, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITIONS FOR CERTIORARI

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December 21, 1990

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the results standard of Section 2 of the Voting Rights Act, as amended, applies to elective judicial systems?

2. Whether a vote dilution challenge under the results standard of Section 2 of the Voting Rights Act, as amended, can be established against a system for electing judicial officials who function as solo decisionmakers?

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MEMORANDUM IN RESPONSE TO PETITIONS FOR CERTIORARI

This memorandum, filed on behalf of the state officials who were official-capacity defendants in the district court,[1] responds to two petitions for writs of certiorari arising from the same decision and presenting virtually identical questions for review. The two petitions are *Houston Lawyers' Association v. Mattox*, No. 90-813, and *League of United Latin American Citizens, Inc. v. Mattox*, No. 90-974. The petitioners in these two cases will be referred to as "HLA" in the case of No. 90-813 and "LULAC" in the case of No. 90-974.

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[1] These respondents are: the Attorney General of Texas (Jim Mattox); the Secretary of State of Texas (George S. Bayoud, Jr.), and the thirteen members of the Judicial Districts Board of Texas. The Judicial Districts Board is comprised of the Chief Justice of the Supreme Court of Texas (Thomas R. Phillips), the Presiding Judge of the Court of Criminal Appeals of Texas (Michael J. McCormick), the President of the Texas Judicial Council (Judge Joe Spurlock, II), an attorney (Leonard E. Davis) appointed by the Governor of Texas, and the Presiding Judges of the nine Administrative Judicial Regions in Texas (Judges Pat McDowell, Thomas J. Stovall, Jr., B. B. Schraub, John Cornyn, Darrell Hester, Sam B. Paxson, Weldon Kirk, Jeff Walker, and Ray D. Anderson). This memorandum will refer to them collectively as "state officials." Two Texas state district judges -- one from Harris County and one from Dallas County -- intervened in the district court proceeding as defendants in their personal capacities only. This memorandum is not filed on their behalf. Likewise, this memorandum is not filed on behalf of six Texas state district judges based in Bexar County, Texas, who appealed the district court's denial of their attempted intervention but failed to obtain an intervention ruling from the Fifth Circuit. An attorney (Mr. Wheatley) purporting to represent them has entered an appearance in this Court. Insofar as he is appearing to represent them in their official capacities as state officials, the Attorney General of Texas challenges the attorney's legal authority to appear.

OPINIONS BELOW

HLA's Appendix omitted four district court orders modifying its Memorandum Opinion and Order of November 8, 1989, HLA App. 183a-304a. It also omitted the district court's two orders on remedy. The omitted orders constitute the appendix following this memorandum.

JURISDICTION

HLA and LULAC invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) to review the Fifth Circuit's decision of September 28, 1990.

STATUTES INVOLVED

HLA's petition, at 3, omits from the end of its quotation of subsection (a) of the current version of Section 2 of the Voting Rights Act the phrase "in contravention of the guarantees set forth in § 1973b of this title, as provided in subsection (b) of this section." LULAC's petition, at 2-3, contains the complete text of Section 2.

STATEMENT OF THE CASE

The Fifth Circuit opinion accurately summarizes the procedural history of this case; however, heeding the Court's Rule 15.1 admonition to respondents to address any perceived misstatements of fact or law in certiorari petitions which potentially bear on the issues before the Court, the state officials supplement the Fifth Circuit's summary in response to some of the statements in the petitions of HLA and LULAC.

The Proceedings Below

At the time of trial in September, 1989, the district court had before it constitutional and statutory challenges to the Texas system of electing judges in ten Texas counties, not eleven as stated by HLA and not nine as stated by LULAC. The ten targeted counties contained 172 of the then-extant 384 (not 375) judicial districts in Texas. Now, the ten targeted counties contain 174 of the 386 judicial districts in Texas.[2]

In its November 8th liability decision, as modified in four subsequent orders, the district court rejected the plaintiffs' constitutional claims. It found that the "present system" is not maintained as a tenuous pretext for discrimination. HLA App. 283a. It later determined that the plaintiffs failed to prove "that the present at large system for electing State District Judges in the State of Texas was instituted with the specific intent to dilute, minimize or cancel the voting strength of Black and/or Hispanic voters." HLA App. 302a. No one appealed this determination.

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2 Awaiting decision by a three-judge federal district court in Texas is a challenge under Section 5 of the Voting Rights Act, as amended, to 13 of the 386 judicial districts in Texas, plus four judicial districts which will operate only if certain as-of-yet unmet preconditions are satisfied (and which would bring the total number of Texas judicial districts to 390). Six of the 13 (and 10 of the total of 17) newly challenged districts are in the ten counties targeted in this lawsuit. The case, tried on December 12, 1990, is *Mexican American Bar Association of Texas, et al. v. Texas, et al.*, Civ. Action No. MO-90-CA-171 (W.D. Tex.) ("*MABA*"). The challenge, lodged at overlapping, but not wholly contiguous, targets by private plaintiffs and the United States, principally is based on the November 5, 1990, letter from the Department of Justice's Assistant Attorney General for Civil Rights, HLA App. 305a-308a, as substantially modified by his letter of November 20, 1990, which is not in HLA's Appendix.

Tellingly, HLA and LULAC offer differing characterizations of the constitutional challenge rejected by the district court. HLA characterizes its challenge as one against "the at-large, winner-take-all, majority vote, numbered post requirement" for electing district judges. HLA Pet., at 5. LULAC characterizes the challenge more narrowly as one directed at a state constitutional provision establishing the manner by which smaller-than-countywide judicial districts may be created. LULAC Pet., at 6. The breadth of the district court's decision on the constitutional issue indicates that HLA's characterization is nearer the mark.

Invoking the three-part test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), and canvassing other factors enumerated in the Senate Report on the 1982 amendments to the amended Section 2, the district court found unintentional vote dilution in all the targeted judicial districts in all the targeted counties and, consequently, a violation of the effects standard established in Section 2 of the Voting Rights Act.

In the course of reaching this result, the district court rejected the state officials' argument that any analysis of the plaintiffs' claim of unintentional vote dilution must take into account evidence about the impact of partisan voting patterns on electoral outcomes. Despite its characterization of *Whitcomb v. Chavis*, 403 U.S. 124 (1971), as having rejected a racial vote dilution challenge on the ground that partisan voting best accounted for electoral outcomes, the district court concluded that "[p]arty affiliation is ***simply irrelevant***[.]" HLA App. 287a (emphasis added).

The district court thus refused to assess in any fashion the evidence offered to demonstrate that partisan voting patterns best accounted for electoral outcomes in each of the targeted counties. The facts relevant to HLA's statement, HLA Pet., at 11, that race consistently outweighed partisan affiliation in district judge elections in Harris County have never been evaluated by a court and remain hotly contested.

Subsequently, the district court ordered implementation of a non-partisan, single-member district election system for 1990 judicial elections in the targeted counties. It is to this specific remedy, and to no other, that HLA refers when it rather vaguely states that the district court found that "an alternative electoral scheme" would provide equal opportunity to minority voters, HLA Pet., at 12.

Through separate timely notices, the state officials first appealed the liability decision of November 8, 1989, and, later, the subsequent remedial orders of January 2, 1990, and January 11, 1990. On January 10, 1990, in an event omitted from HLA's petition, the state officials filed an emergency motion to stay the district court's remedy. (Other parties had filed stay motions earlier.) The Fifth Circuit filed its stay order on January 11, 1990.

The Fifth Circuit panel, in a two-to-one vote, held that unintentional vote dilution claims could not be established against Texas trial judges whom

the district court had found to be "sole, independent decision makers." HLA App. 289a.[3]

The Fifth Circuit in an *in banc* decision on September 28, 1990, held that the effects standard of Section 2 is inapplicable in challenges to systems for electing judges. Five members of the Fifth Circuit joined the second part of a concurring opinion by Judge Higginbotham adopting the rationale that vote dilution claims under Section 2's effects standard cannot be established against solo decisionmaker judgeships. Chief Judge Clark filed a special concurrence for himself only, and Judge Johnson was the sole dissenter from the court's judgment.

LULAC misleadingly characterizes the district court's findings on vote dilution as "undisturbed on appeal." LULAC Pet., at 8 n.3. The more accurate characterization is that they were "unaddressed" on appeal. A myriad of legal and factual disputes lying beyond the basic statutory coverage question remain unaddressed thus far at the appellate level. Many of them, including one of overwhelming significance (the relevance of partisan voting patterns to vote dilution analysis), have importance in voting rights law beyond the sphere of judicial elections and will have to be addressed by the Fifth Circuit on remand and perhaps subsequently by this Court even if HLA and LULAC prevail on the questions they have presented to the Court.

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3 Contrary to the implication in HLA's petition, at p. 8, this case and the *Chisom* case out of Louisiana were *not* argued together before the Fifth Circuit panel on April 30, 1990. They were argued separately and focused on different issues.

Statement of Facts

The state officials here seek only to correct certain omissions or misstatements in the certiorari petitions which appear potentially relevant to the basic coverage issues presented to the Court. As already explained, the Fifth Circuit did not have occasion to address the many facts in this case concerning, for example, electoral outcomes in the targeted counties over the last decade. Those facts are largely irrelevant in the case's posture before this Court, and the state officials will not undertake to refute every shade of error in HLA and LULAC's recitation of the underlying facts.

Texas elects its district judges through partisan elections. Contrary to HLA's statement that both primary and general elections for state district judge have a majority vote requirement, HLA Pet., at 9-10, only the party primary elections have such a requirement. A plurality suffices for victory at the general election.

HLA is technically incorrect in its statement that every targeted county elects more than one district judge, HLA Pet., at 10. Crosby County is implicated by only one of the challenged judicial districts, the 72nd, which encompasses Lubbock and Crosby counties.

HLA also is incorrect in the statement opening its recitation of the facts of the case that Texas judicial districts may be no smaller than an entire county, HLA Pet., at 9. Section 7a(i) of Article 5 of the Texas Constitution permits the voters of a county the opportunity to authorize the

creation of judicial districts smaller than the entire county.

ARGUMENT (STATEMENT)

No Opposition to Court Review

The state officials do not oppose this Court's granting of HLA and LULAC's petitions for writs of certiorari. The questions raised are of undoubted significance to the nation's jurisprudence, many of its state judicial systems, and minority voters.

Furthermore, the state officials are constrained to concede that the *in banc* Fifth Circuit decision of September 28, 1990, conflicts with the earlier Sixth Circuit decision in *Mallory v. Eyrich*, 839 F.2d 620 (6th Cir. 1988), although the two decisions do not run on such parallel tracks that they conflict in every particular element of their analysis. It is enough that there is a basic conflict in their results.

The preceding concession by the state officials should in no way be viewed as a concession that the Fifth Circuit reached an incorrect result. It did not; however, as the state officials understand it, the correctness of the result below is not a matter with which the Court is particularly concerned at this stage of its review process.

Likewise, the concession of the appropriateness of this case for plenary (not summary) review by the Court is not a concession of LULAC's argument that the Fifth Circuit decision conflicts with the Court's summary affirmances in two cases involving the interaction of Section 5 of the Voting Rights Act and judicial elections, *Georgia State Board of Elections v. Brooks*, Civ. No.

288-146 (S.D. Ga. 1989), *aff'd mem.*, 111 S.Ct. 288 (1990), and *Haith v. Martin*, 618 F.Supp. 410 (E.D. N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986). Despite the oft-repeated claim that the two provisions, Section 2 and Section 5, operate in tandem, they remain different provisions, with different language, different applications, and different repercussions. Holding, as the Fifth Circuit did, that the effects standard of Section 2 does not cover racial vote dilution challenges to judicial elections does not present a conflict with summary affirmances in Section 5 voting rights cases affecting judges which would warrant this Court's review.

Having distinguished Section 2 cases from Section 5 cases, the state officials do note a possible additional reason why the Court should grant certiorari in this case. The United States, through its Department of Justice, has indicated that it is not bound, ***even in Texas***, by the Fifth Circuit's *LULAC* decision on Section 2's reach. *See* HLA App. 307a.[4] Instead, argues the United States, Section 5 empowers it to independently assess Section 2's reach in Texas, regardless of governing Section 2 law in the Fifth Circuit.

Texas is a covered jurisdiction under Section 5. Surely, the United States, through the Justice Department, will acknowledge that it is at least bound by a decision of this Court on the reach of Section 2. Thus, a clear statement from this Court

[4] During the trial on December 12, 1990, in the *MABA* case, *supra* at 3 n.2, the attorney for the United States continued to defend this position, which appears to contravene the Court's assessment that the United States Attorney General "does not act as a court" in exercising his Section 5 powers of review of state legislation, *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969).

on Section 2's reach will enable Texas and the United States to agree to be bound by the same judicial rulings. Texas should not be compelled to defend its position on Section 2's reach twice, once before the Fifth Circuit and, afterwards, before the United States Attorney General.

Additional Issues Within The Court's Purview

HLA urges the Court to hear this case "at the same time" as the case of *Chisom v. Roemer*, No. 90-757, HLA Pet., at 22. Whatever may be meant by this request, the state officials suggest that the Court not consolidate this case with *Chisom*. No claims of intentional discrimination remain in this case, whereas, at least as the undersigned counsel understands it, such claims do remain part of the *Chisom* case.

HLA also urges the Court to review the subsidiary question of whether the principle announced in the Fifth Circuit's panel decision concerning unintentional vote dilution claims and solo decisionmakers is correct. HLA's argument for this approach is that leaving it for the Fifth Circuit to decide on remand (if, indeed remand ultimately is necessary) would be a "time-consuming and pointless course." HLA Pet., at 25.

While the state officials have no quarrel with HLA's suggestion, they would add that HLA's rationale also suggests the advisability of this Court also taking up another question, if it ultimately agrees with the petitioners on their arguments. That question is whether *Whitcomb v. Chavis*, *supra*, remains good law under Section 2 of the Voting Rights Act. As explained earlier, the district court, through its treatment of partisan voting patterns as a legal and factual irrelevancy,

treated *Whitcomb* as a dead letter in Section 2 vote dilution analysis.

There is no reason for this Court, should it disagree with the state officials on the scope of Section 2's coverage, not to reach this additional critical question in voting rights law. It potentially is a critical question in this case, and it assuredly will be a critical question in the litigation ensuing from the upcoming round of decennial reapportionment.

CONCLUSION

This case is a critical one for states which elect their judicial officers. The state officials, while vigorously defending the correctness of the result reached by the Fifth Circuit, recognize that the questions presented here need to be definitively settled. The requisite definitiveness can occur nowhere but here -- especially in light of the United States' puzzling intransigence on the question. Based upon the foregoing matters, the state officials do not oppose the Court's granting of HLA and LULAC's petitions for writs of certiorari and the setting down of these cases for plenary review.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

RENEA HICKS*
Special Assistant
Attorney General

JAVIER GUAJARDO
Assistant Attorney General

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(512) 463-2085
Attorneys for State Respondents
* *Attorney of Record*

Dec. 21, 1990

APPENDIX

FILED
NOV 14 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LULAC COUNCIL #4434, ET AL.,	§	Civil Action No.
vs.	§	MO-88-CA-154
JIM MATTOX, ET AL.,	§	

ORDER

Came on for consideration, Dallas County plaintiff/intervenors' Motion to Correct Clerical Mistake, and after having reviewed the pleadings, it is the opinion of this Court that said Motion is well taken and it is therefore,

ORDERED, ADJUDGED and DECREED that:

1. Dallas County plaintiff/intervenors shall be noted in the style together with other plaintiff and defendant intervenors; and

2. at the conclusion of the paragraph numbered "3." that the following description of Dallas County plaintiff/intervenors shall be inserted: "plaintiff/intervenors from Dallas County, Jesse Oliver, Joan Winn White and Fred Tinsley, are black attorneys and citizens of Dallas County, Texas, each of whom is a former district judge from Dallas County,

who was defeated in a county-wide election for district judges."

SIGNED this the 14th day of November, 1989.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
NOV 27 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
COUNCIL #4434	§	
et al.	§	
Plaintiffs,	§	
AND	§	
HOUSTON LAWYERS	§	
ASSOCIATION	§	
et al.	§	
Plaintiff-Intervenors	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
State Defendants	§	
AND JUDGE	§	
SHAROLYN WOOD	§	
AND JUDGE F. HAROLD	§	
ENTZ	§	

ORDER

BEFORE THIS COURT is the State Defendants' Motion to alter or Amend this Court's Memorandum Opinion and Order of November 8, 1989 in the above-captioned cause. After this Court's Order was signed and entered, it was

brought to the attention of the Court that there were some clerical errors and omissions in this Court's Order. This Court is of the opinion that the State Defendants' Motion should be granted in part and denied in part. Accordingly,

IT IS ORDERED that this Court's previous Memorandum Opinion and Order be amended in part.

IT IS FURTHER ORDERED that the items telephonically communicated to this Court by Plaintiffs' Counsel be amended as follows:

1. The top of page 13 just before Finding of Fact number four be amended to reflect the following:

Plaintiff-Intervenors from Dallas County include Joan Winn White, Fred Tinsley and Jesse Oliver.

2. The last line of the second paragraph of Finding of Fact number eight on page 17 is amended to read, " ... greater than fifty percent (50%) Hispanic voting age population were possible."

3. The second sentence of the first full paragraph on page 21 is amended to read, "Minority residents are concentrated largely in the Northeastern, East Central and Southeastern sections of Midland County."

4. Conclusion of Law number 16, as continued at the top of page 90, line one, is amended to include "Hispanic" after "Black" and the appropriate comma.

IT IS FURTHER ORDERED that items 1-3, 6 & 11 of the State Defendants' Motion are hereby GRANTED.

IT IS FURTHER ORDERED in connection with item 5 of the State Defendants' Motion that Finding of Fact 20.a. on page 49 is amended as follows:

Dr. Brischetto analyzed three (3) 1988 countywide judicial elections in Travis County. All three elections analyzed were County Court at Law Primary Elections.

IT IS FURTHER ORDERED that in connection with item 9 State Defendants' request is GRANTED IN PART to reflect that it was the 1986 Democratic Primary that was being discussed, rather than the Runoff Election. Item 9 is DENIED in all other respects.

IT IS FURTHER ORDERED that items 4, 7, 8 & 10 of the State Defendants' Motion are hereby DENIED.

IT IS FURTHER ORDERED that this Court's Memorandum opinion and Order remains unchanged in all other respects.

SIGNED AND ENTERED this the 27th day of November, 1989.

/s/
LUCIUS D. BUNTON
CHIEF JUDGE

FILED
DEC 26 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

LULAC COUNCIL #4434, et al., Plaintiffs,	§	
	§	Civil Action No.
vs.	§	MO-88-CA-154
JIM MATTOX, et al., Defendants.	§	

ORDER

On this day came before the Court the State Defendants' Rule 60 (a) Motion to Correct Clerical Mistake. The motion is GRANTED. The last sentence of the last full paragraph on the second page of the Court's Order of November 27, 1989, is corrected to read as follows: "All three elections analyzed were 1988 Democratic Primary elections, two of which were for county court at law positions and one of which was for a district court position."

SIGNED and ENTERED this 26th day of December, 1989.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
DEC 28 1989
CHARLES W. VAGNER, Clerk
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LULAC, et al., Plaintiffs,	§	
	§	NO. MO-88-CA-154
vs.	§	
MATTOX, et al., Defendants.	§	

ORDER TO CORRECT CLERICAL ERRORS

1. In accordance with F.R.Civ.P. 60, the Court makes the following corrections of clerical mistakes in its Memorandum Opinion and Order of November 8, 1989:

2. On page 12, the following sentence is added to Paragraph 2: "Jesse Oliver, a Black from Dallas, testified that he is a member of LULAC."

3. On page 18, the following sentence is added to the end of the second complete paragraph of Paragraph 9: "This remains true when Plaintiffs controlled for voting age population of non-United States citizen of Spanish origin."

Done this 28th day of December, 1989, at Midland, Texas.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
JAN 2 1990
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/ DEPUTY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
COUNCIL #4434	§	
et al.,	§	
Plaintiffs	§	
AND	§	
HOUSTON LAWYERS	§	
ASSOCIATION	§	
et al.	§	
Plaintiff-Intervenors	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
State Defendants	§	
AND JUDGE	§	
SHAROLYN WOOD	§	
AND JUDGE F. HAROLD	§	
ENTZ	§	

ORDER

BEFORE THIS COURT are the parties with their respective Proposed Interim Plans, Motions to Certify this Court's Memorandum Opinion and Order, of November 8, 1989, for Interlocutory

Appeal, and Motion of Bexar County District Judges to Intervene in the above captioned cause.

This case is reminiscent of several lines of a recent song, I'm for Love, by Hank Williams, Jr. The lyric goes,

> "The city is against the county,
> The county is against the state,
> The state is against the government,
> and
> The highway still ain't paved."

In this case the Governor has been against the Attorney General, the Attorney General against the Legislature, the Judges against this Court, and the system is still flawed. This is a regrettable situation, but it can't be helped. The Hank Williams song goes on to say "But I'm for love, and I'm for happiness."

This case was filed on July 11, 1988 and originally set for trial on February 13, 1989. The Court was persuaded, at least on one occasion, to continue the trial to give the Texas Legislature a chance to address the issue during its Regular Session. This Court continued the above captioned cause to April 17, 1989 to await the United States Supreme Court's disposition of the Petition for Writ of Certiorari in the case of Roemer v. Chisom. The Court again continued the case to July 11, 1989, based on oral Motions to Continue made on the record during a hearing on Motions to Intervene held by this Court on February 27, 1989. The Court continued the trial to September 18, 1989, because of a conflict of settings with one of the attorneys. At the conclusion of the trial in September, the Court was requested to hand down its opinion prior to the convening of the Texas Legislature in Special Session so that a violation (if one was indeed found) could be looked at and perhaps remedied during the Special Session.

This Court specifically reserved ruling upon Plaintiffs' Motion for an Order enjoining further use of the at-large election scheme in the affected counties until the State Legislature had an opportunity to offer a remedial plan. The Legislature went into Special Session on November 13, 1989, some five days after entry of this Court's November 8, 1989 Order. Governor Clements deemed it advisable not to submit the question of judicial redistricting to the Special Session. The Governor did, however, request that he and this Court meet and discuss the matter. The meeting was held, and attorneys for both Plaintiffs and Defendants were present. The Governor advised the Court that no remedy would be forthcoming until some time after the March 13, 1990 Primary Elections. The Governor requested that the matter be delayed until the Regular Session of the Legislature in January 1991. He further advised the Court that, if this was not satisfactory, he would call a Special Session some time in April or may of 1990 and request the Legislature to study and take whatever action might be necessary to remedy the situation.

The timing is perhaps unfortunate. There will be a census taken in 1990, which may reflect some changes in population in the nine counties involved. Our Legislature meets in Regular Session only in odd years and inevitably somewhere down the line the method of selection or election of State District Judges will have to submitted to the voters of Texas. The Court is of the opinion that a delay until after the Primary Elections are held in 1990 and a delay until after a Special Session of the Legislature is held in late spring of 1990 and a further delay of implementation of any solution by the Legislature would not be in the interest of justice, would further dilute the rights of minority

voters in the target counties in question, and would be inequitable and work an even greater hardship on the judges and courts involved.

Because the Legislature took no action on the matter in Special Session in November and December, 1989, and the refusal of the Supreme Court to grant a writ in Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir. 1988), and the statements of the Governor of the State of Texas, and the imminence of the Primary Elections in 1990, the Court is not inclined to defer action. See Wise v. Lipscomb, 437 U.S. 535 (1978). Under these circumstances, this Court is of the opinion that it may fashion an interim plan that the law, equity and justice require. Chisom, supra, at 1192. On December 12, 1989, or shortly thereafter, all parties were advised to file any Proposed Plans and objections with the Court by December 22, 1989. An Agreed Settlement was entered into by and between the Plaintiffs and Defendants in this matter, but was not approved by some of the Intervenors.

The Court should point out that the State Legislature will have still a third opportunity to propose a permanent remedy consistent with this Court's November 8, 1989 Order should it convene, and should it pass legislation in April or May of 1990.

The plan which follows is strictly an interim plan for the 1990 elections affecting 115 State District Court judicial seats in the nine counties in action. Upon consideration of the Motions, Responses, Objections, letters, exhibits, attachments and arguments of the parties, the Court is of the opinion that the following Orders are appropriate. Accordingly,

IT IS ORDERED that the Joint Motion of Plaintiffs, Plaintiff-Intervenors and the Attorney

General of Texas for Entry of a Proposed Interim Plan is hereby GRANTED IN PART and DENIED IN PART in the following respects:

1. All Defendants and those acting in concert are hereby enjoined from calling, holding, supervising and certifying elections for State District Court Judges in Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties under the current at-large scheme.

2. For the 1990 elections, according to the Secretary of State of Texas, one hundred fifteen (115) District Court elections are scheduled in the counties affected by this Court's Order. The following number of District Courts are up for election by respective county: Harris (36); Dallas (32); Tarrant (14); Bexar (13); Travis (6); Jefferson (6); Lubbock (3); Ector (3); and Midland (2).

Under this Interim Plan, District Court Elections in Harris, Dallas, Tarrant and Bexar Counties shall be selected from existing State Legislative House District lines as indicated in Attachment A. District Court Elections in Travis County shall be from existing Justice of the Peace Precinct Lines. See Attachment A. District Court Elections in Jefferson, Lubbock, Ector and Midland Counties shall be according to existing County Commissioner Precinct Lines. Id. Each county shall be designated by a District Number, and each election unit by subdistrict number.

3. Each candidate shall run within a designated subdistrict and be elected by the voters in the subdistrict. Consistent with the Texas Constitution, each candidate must be a resident of his or her designated judicial district (which is countywide), but need not be a resident of the election subdistrict.

4. Elections shall be non-partisan. Each candidate shall select the election subdistrict in which he or she will run by designated place. Candidates in Dallas, Tarrant, Bexar, Ector and Midland Counties shall file an application for a place on the election ballot with the County Elections Administrator. Tex. Elec. Code Ann §31.031 et seq. (Vernon 1986). Candidates in Harris, Travis, Jefferson and Lubbock counties shall file such an application with the County Clerk of those counties or the County Tax Assessor-Collector, depending on the practice of that particular county. Tex. Elec. Code Ann. §§ 31.1031 et seq., 31.091 (Vernon 1986).

5. All terms of office under this Interim Plan shall be for four (4) years. Tex. Const. Art. V. §7 (1976, amended 1985). This Court is of the opinion that a two-year term is unfair to both those beginning and those ending their judicial careers.

6. Elections shall take place the first Saturday of May, 1990, with Run-off Elections to take place the first Saturday of June, 1990. Tex. Elec. Code Ann. §41.001(b)(5) (Vernon Supp. 1989).

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on March 26, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

8. In 1991, the Administrative Judge of the countywide district shall designate:

(1) Any courts of specialization in terms of docket preference; and

(2) The District Court numbers in use prior to the Interim Plan's adoption. Successful incumbents shall have preference in such designation.

9. Current jurisdiction and venue of the District Courts remain unaffected, subject to modification by rule of the Supreme Court of Texas.

10. There shall be no right of recusal of judges elected under this plan. This Court is of the view that such a measure would be extremely disruptive to District Court dockets, administratively costly and could be the source of abuse by attorneys attempting to gain continuances of their cases.

IT IS FURTHER ORDERED that the above Interim Plan applies only to the 1990 State District Court Judicial Elections in the nine target counties at issue in this case. If the Texas Legislature fails to fashion a permanent remedy by way of a Special Called Session in the spring of 1990, then this Court will put into effect a Permanent Plan for the election of State District Court Judges in the nine target counties in question.

IT IS FURTHER ORDERED that the Motions of Defendant-Intervenor JUDGE SHAROLYN WOOD, Defendant-Intervenor JUDGE HAROLD ENTZ and the State Defendants to Certify this Court's Memorandum Opinion and Order of November 8, 1989 as modified for clerical corrections on November 27, 1989 and December 26, 1989 for Interlocutory Appeal pursuant to 28 U.S.C. §1292(b) is hereby GRANTED IN PART.

IT IS FURTHER ORDERED that to the extent that such Motions request a stay of further proceedings in the above captioned cause such Motions are hereby DENIED.

IT IS FURTHER ORDERED that the Motion of Bexar County Judges TOM RICKOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE AND MICHAEL P. PEDEN to intervene as Defendants in the above captioned cause is hereby DENIED.

This Court, of course, has granted the right for an Interlocutory Appeal. The request to stay proceedings pending the appeal is DENIED, because the Court does not feel that District Judges should be continued in office for an indefinite period of time. The right of the electorate to select judges in the year 1990 should not be dented unless, of course, interim action is taken by the Texas Legislature which changes the method of the selection and election of judges. The pressing need for the administration of justice in our state courts is recognized. It is the opinion of this Court that the plan set forth herein is the least disruptive that can be effected at this juncture. To allow Primary Elections in 1990 to be held in the same manner as they were in 1988 would be contra to the dictates of Fifth Circuit law and the Congressional Mandate of the Voting Rights Acts. Recognition of the November 8, 1989 Judgment has far-reaching effects is the reason for the allowance of an expedited appeal, and again the Court would encourage the Governor to call a Special Session to address the matter and, further, would request that the State Legislature remedy the current situation, as the Court is firmly of the opinion that any remedy other than this interim remedy should be done by duly elected legislators.

SIGNED and ENTERED this 2nd day of January, 1990.

/s/
LUCIUS D. BUNTON
Chief Judge

FILED
JAN 11 1990
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
et al.	§	
	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX,	§	
Attorney General	§	
of the State of Texas,	§	
et al.	§	

ORDER

BEFORE THIS COURT is the Motion of Attorney General Jim Mattox on behalf of the State of Texas to Alter this Court's Order of January 2, 1990; the Response thereto of Harris County District Judge Sharolyn Wood; and the Response thereto of Plaintiffs LULAC et al., Plaintiff-Intervenors Jesse Oliver, et al., and Plaintiff-Intervenors Houston Lawyers Association et al. Having considered said Motion and Responses, the Court is of the opinion that said Motion should be denied.

The Court is further of the opinion that other changes to certain terms of the injunction

contained in that January 2, 1990 Order are proper. Specifically, the Court herein modifies the Order for the limited purpose of delaying the elections ordered pursuant to its Order, and removing the expedited rights of appeal previously granted in this matter.

The Court believes that delaying judicial elections pursuant to its Order of January 2, 1990 is desirable for several reasons. First, the Court notes that Governor Bill Clements recently called a special session of February 27, 1990, to deal specifically with Texas' system of selecting judges. In the interests of comity and Federalism, legislatively directed remedial measures are preferable to measures ordered by this Court. Delaying the judicial elections ordered by this Court will serve these interest by giving the Legislature additional time. Second, judicial elections will still take place in 1990 under the modified Order, thus minimizing disruption of the Texas judiciary. Third, delaying court-ordered judicial elections will provide additional time for the United States Department of Justice to consider any remedy adopted by the Legislature before such elections occur. Fourth, delaying these elections will remove the need for expedited appeal to the Fifth Circuit by providing additional time for that Court to consider and rule upon this Court's Order before court-ordered judicial elections occur.

The Court urges the Legislature to consider in its deliberations a quotation from President Harry S. Truman, who said, "[w]e must build a better world, a far better world--one in which the eternal dignity of man is respected."

I. The Attorney General's Motion is Properly Asserted Pursuant to Rule 59(e), Fed. R. Civ. P., and This Court Retains Jurisdiction to Modify Its Order of January 2, 1990.

The Defendant-Intervenor Judge Wood of Harris County appears to question the effect of the Attorney General's Motion on the notices of appeal filed in this case by herself and Judge Entz, and the powers of this Court to modify the terms of the injunction contained in its Order of January 2, 1990. There is no serious dispute before the Court that the parties to this case have the right under 28 U.S.C. Section 1292(a) (1) to appeal this Court's Order of January 2, 1990. If that Order were a judgment as to which the Attorney General's Motion is properly asserted under Rule 59(e), then the Parties' notices of appeal are ineffective, the Court retains jurisdiction to modify the judgment, and the deadlines for appeal are extended according to Fed. R. App. P. 4(b) (4). The Court believes that Order is such a judgment, and that this is the correct analysis.

A "judgment' for purposes of Rule 59(e), which provides for the amendment of a judgment and the postponement of the time for filing an appeal, is defined in Rule 54(a). See Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE Section 2651 and cases cited therein. Rule 54(a) defines judgment as an "appealable order." 28 U.S.C. Section 1292(b) undisputedly makes this Court's Order of January 2, 1990 appealable of right. Therefore a motion to alter or amend the judgment is properly asserted under Rule 59(e).

The Attorney General's Motion would properly be brought under Rule 62(c), if jurisdiction of the case were already lodged in the court of appeals, for example where a Rule 59(e)

motion was not timely made and appeal was taken, or a Rule 59(e) motion was made and ruled upon, and appeal subsequently taken.

The Court assumes for the purposes of this Motion that there exist other circumstances that would make a Rule 59(e) Motion improper here, although the Court takes pains to note that the parties have not cited the Court to such circumstances, and the Court in examining its jurisdiction has so far found none. In that event, Judge Wood contends, the Attorney General's Motion is one properly asserted under Rule 62(c), under which Rule this Court's modification powers are curtailed.

The Court also assumes that its sua sponte alteration of a judgment, that is independent of and goes beyond the alteration requested by a party under Rule 59(e), might be reviewed under the standard of Rule 62(c). The problem is that the timely filing of a Rule 59(e) motion, which the Court believes has been done here, suspends the appeal process and renders Rule 62(c) technically inapplicable because the case is not on appeal. Absent appeal, a district court has complete power over its interlocutory orders. Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2nd Cir. 1962).

It is important to note that this Court has consistently voiced its preference for the Texas authorities devising a plan for judicial elections consistent with the Voting Rights Act, with reasonable dispatch, and therefore has considered and styled its January 2, 1990 injunction as an interim plan. The Order is, of course, binding and effective if, and to the extent, the Legislature fails to act. If the Legislature devises an acceptable plan under the Voting Rights Act this lawsuit, and the Court's injunction along with it, would likely become moot. Of course, an argument could be

made that this Court's interim plan of redistricting, because conditional in this sense, is not a judgment at all until the contingency has been removed, and therefore is not even appealable. In any event, this Court's overall plan of encouraging legislative redistricting is, the Court believes, relevant to considering, under the law of Rule 62(c), what constitutes a modification of an injunction "in aid of appeal."

In sum, the Federal Rules of Civil Procedure do not seem to provide a neat category for classifying motions on equitable remedies such as the one at issue. This Court is of the opinion that the Attorney General's Motion is one properly brought under Rule 59(e) because this Court's Order of January 2, 1990 is a "judgment" within the meaning of Rule 54(a). However, in the event this characterization is error, as Judge Wood seems to contend it is, the Court believes it proper to apply the more restrictive analysis under Fed. R. Civ. P. Rule 62(b) as set out in cases cited by the parties.

II. Alternatively, This Court Possesses Jurisdiction to Make Modifications to Its January 2, 1990 Order as Ordered Herein Pursuant to Rule 62(b), Fed. R. Civ. P.

Judge Wood challenges this Court's jurisdiction to entertain a motion to modify its January 2, 1990 Order, and presumably as well the Court's jurisdiction to modify said Order sua sponte. However, despite Judge Wood's artful choice of quotations from pertinent case law, the Court is not persuaded that it lacks jurisdiction to make certain changes in its Order even if the injunction contained therein is properly on appeal.

Once appeal is taken form an interlocutory judgment (as the Court assumes for discussion purposes that is has been here), Fed. R. Civ. P. 62(c) provides that "the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal . . . ." The scope of this Court's power under Rule 62(c) has most recently been the subject of analysis by the Fifth Circuit in Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817 (5th Cir. 1989). Under the holding in Coastal, this Court is definitely constrained insofar it lacks authority to dissolve the injunction on appeal. Id. at 821. But regarding less radical modifications, the Court is directed to limit the exercise of its power to "maintaining the status quo." Id. at 820.

Judge Wood would have the Court interpret "maintaining the status quo" to mean that this court may do nothing except "in aid of the appeal." Willie v. Continental Oil Co., 746 F.2d 1041 (5th Cir. 1984). The Fifth Circuit applied this directive in Willie to divest the District Court of jurisdiction to modify a judgment under Rule 60(b) because of inadvertence or excusable neglect, where substantive rights of the parties were at stake. Id. at 1045. In Willie, the parties sought to have the District Court correct its judgment to incorporate a mistakenly-omitted stipulation regarding the percentage of liability to be borne by one of the defendants. The District Court was empowered to deny such a motion because denial would be "in furtherance of the appeal." But had the District Court wished to grant the Rule 60(b) motion, leave of the Court of Appeals would have been required. Id. at 1046.

In the Coastal case, however, the Fifth Circuit seemed to impose a different standard of "maintaining the status quo," and defining that

standard to mean that a district court may not take action, such as vacating an injunction, that would presumably divest the court of appeals from jurisdiction while the issue is on appeal. Coastal, supra, at 820. Cases cited in the Coastal opinion consistently deal with granting or staying injunctions during the pendency of appeal. Id. Consistent with the analysis expressed in the Attorney General's brief, this Court interprets Coastal to say that it may not vacate the injunction now in issue while it is on appeal. No such action is contemplated.

Even if the "in aid of appeal" standard set out in Willie should guide the Court, it would seem that the modifications now ordered, which primarily give the Legislature additional time to consider redistricting, does not violate that standard.

Accordingly, this Court's Order of January 2, 1990 will be amended.

IT IS ORDERED that this Court's Order of January 2, 1990 be, and is hereby amended pursuant to the following directive only.

Item numbered "6" at pages 6 and 7 is amended to read as follows:

> 6. Elections shall take place on November 6, 1990 with runoff elections, if and where necessary, on December 4, 1990.

Item numbered "7" at page 7 is amended to read as follows:

> 7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on September 19, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

IT IS FURTHER ORDERED that any rights of expedited appeal granted in this matter be, and are hereby RESCINDED.

SIGNED AND ENTERED this 11th day of January, 1990.

/s/_____
LUCIUS D. BUNTON
CHIEF JUDGE

SUPREME COURT, U.S.
FILED
DEC 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

(4)

NO. 90-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,
v.
JIM MATTOX, *et al.*,
Respondents.

HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD'S BRIEF IN OPPOSITION TO HOUSTON LAWYERS' ASSOCIATION'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether elected state judges are "representatives" within the scope of § 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b), and, if so, whether § 2(b) is constitutional as thus interpreted?

2. Whether independent overlapping county-wide judicial election districts are within the scope of § 2(b) of the Voting Rights Act and if so, whether § 2(b) is constitutional?

PARTIES

The participants in the proceedings below were:

Plaintiffs:

LULAC Local Council 4434
LULAC Local Council 4451
LULAC (Statewide)
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Willard Pen Conat
Gene Collins
Al Price
Theodore M. Hogrobrooks
Ernest M. Deckard
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty
Jesse Oliver
Fred Tinsley
Joan Winn White

Defendants:

Jim Mattox, Attorney General of Texas
George Bayoud, Secretary of State
Texas Judicial Districts Board

Thomas R. Phillips, Chief Justice, Texas Supreme Court
Mike McCormick, Presiding Judge, Court of Criminal Appeals
Ron Chapman, Presiding Judge, 1st Administrative Judicial Region
Thomas J. Stoval, Jr., Presiding Judge, 2nd Administrative Judicial Region
James F. Clawson, Jr., Presiding Judge, 3rd Administrative Judicial Region
John Cornyn, Presiding Judge, 4th Administrative Judicial Region
Robert Blackmon, Presiding Judge, 5th Administrative Judicial Region
Sam B. Paxson, Presiding Judge, 6th Administrative Judicial Region
Weldon Kirk, Presiding Judge, 7th Administrative Judicial Region
Jeff Walker, Presiding Judge, 8th Administrative Judicial Region
Ray D. Anderson, Presiding Judge, 9th Administrative Judicial Region
Joe Spurlock II, President, Texas Judicial Council
Leonard E. David

Defendants-Intervenors:

Judge Sharolyn Wood
Judge Harold Entz
Judge Tom Rickoff
Judge Susan D. Reed
Judge John J. Specia, Jr.
Judge Sid L. Harle
Judge Sharon Macrae
Judge Michael D. Pedan

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NO. 90-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD'S BRIEF IN OPPOSITION TO HOUSTON LAWYERS' ASSOCIATION'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Because the *en banc* ruling of the Court of Appeals that § 2 of the Voting Rights Act does not apply to the election of state district judges is correct, Respondent/Intervenor Harris County District Judge Sharolyn Wood ("Judge Wood") respectfully opposes the Houston Lawyers' Association's ("HLA"'s) Petition for Writ of Certiorari in this case. Should this Court nevertheless deem the issues raised to be worthy of review, Judge Wood requests that the Court consider or remand to the Court of Appeals, unreached questions developed in the record of this case and that the Court refuse to review those matters outside the scope of this case which are raised in the HLA's Petition.

OPINIONS AND JUDGMENT BELOW

Judge Wood incorporates by reference the Houston Lawyers' Association's ("HLA's") statement of opinions and judgments below. HLA's Petition for Writ of Certiorari ("Petition") at 2. However, she objects to the HLA's inclusion in its statement of "Opinions Below" and in its appendix at pp. 304a-308a of a letter from Assistant Attorney General John Dunne, dated November 5, 1990 interposing an objection to the creation of fifteen additional district judgeships in Texas. That opinion letter is not part of the record of this case and, since it deals with the preclearance of new judicial districts in Texas under § 5 of the Voting Rights Act, is irrelevant to this § 2 case and is included solely to prejudice the outcome of this case.[1]

JURISDICTION

The decision of the Fifth Circuit was entered on September 28, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Federal question jurisdiction is appropriate since this case involves federal statutory and constitutional questions under § 2 of the Voting Rights Act, 42 U.S.C. § 1973; the Civil Rights Act of 1964, 42 U.S.C. § 1983; and the fourteenth and fifteenth amendments to the United States Constitution.

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1. The Court should be aware, however, that a proceeding has been filed by the Texas Attorney General to appeal the Justice Department's denial of preclearance. Given the almost surreptitious attack on the Court of Appeals' opinion, apparent in the Justice Department's letter, Judge Wood calls the Court's attention to the fact that the issues posed squarely here are being obliquely attacked in that proceeding.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves § 2 of the Voting Rights Act, 42 U.S.C. § 1973, set out at HLA's Pet. at 3-4; U.S. Const., amendments XIV and XV, app. at 5a-7a; §§ 7 and 7(a)(i) of the Texas Constitution of 1876, app. at 1a-2a; and, collaterally, § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, app. at 3a-5a.

STATEMENT OF THE CASE

i. Course of Proceedings

This case was brought in the United States District Court for the Western District of Texas, Midland Division, by the League of United Latin American Citizens ("*LULAC*") and certain named black and hispanic individuals. The Plaintiffs, Petitioners in this Court, claimed that Texas' constitutional and statutory system for electing district judges from county-wide districts violated the fourteenth and fifteenth amendments to the United States Constitution, 42 U.S.C. § 1983, and § 2 of the Voting Rights Act by diluting the votes of blacks and/or hispanics in 47 of Texas' most populous counties. The Plaintiffs subsequently withdrew their claims in all but ten counties and limited their claims in Haris County to blacks only and not hispanics. By Order dated March 1, 1989, the district court permitted the HLA and certain named black individuals to intervene as Plaintiffs on behalf of blacks in Harris County; it permitted certain named black individuals to intervene as Plaintiffs in Dallas County (the "Dallas County Plaintiff/Intervenors"); and it permitted District Judge Wood and Dallas

County District Judge Harold Entz ("Judge Entz") to intervene as Defendants.

The case was tried to the bench in Midland, Texas, beginning September 18, 1989. On November 8, 1989, the district court issued its Memorandum Opinion and Order (the "Opinion"). The Court rejected Plaintiffs' constitutional claims but held that Texas' system of electing state district judges diluted the votes of minorities in all target counties in violation of § 2 of the Voting Rights Act.

On January 2, 1990, without a hearing, the district court issued an Order (the "Order") enjoining the calling, holding supervising and certifying of elections for state district judges under Texas' judicial election system in the target counties and imposed its own Interim Remedial Plan. That Plan, which took effect immediately, on the last day on which filing was permitted for judicial races under Texas law, totally rewrote Texas' comprehensive judicial election system set out in the Texas Government Code and Texas Election Code. It adopted virtually *in toto* a remedial plan solicited by the district court and agreed upon by the Plaintiffs, HLA and Texas Attorney General Mattox without notice to the Defendant/Intervenors Judge Wood and Judge Entz.[2] The primary difference between the district court's Interim Remedial Plan and the Plaintiffs/Mattox Plan was the substitution of nonpartisan elections for partisan elections. Judge Wood strenuously opposed both the Interim Remedial Plan and the Plaintiffs/Mattox Plan on fourteenth and fifteenth amendment grounds, in part because both assigned

2. Petitioners' apparent surprise at the district court's Plan (Petition at 12-13, 24) is somewhat disingenuous since Petitioners participated in negotiation of the Plaintiffs/Mattox Plan and endorsed it by signature.

judges to legislative districts, with two judges to each Democratic/minority district and one to each Republican/white district. Defendants appealed both from the injunction and from the November 9 Opinion.

Following expedited oral hearing on April 30, 1990, a three-judge panel of the Fifth Circuit Court of Appeals ruled 2 to 1 in favor of the defense. The Court then ordered *en banc* review *sua sponte* and heard oral arguments on June 19, 1990. Of the thirteen judges who decided the case, twelve ruled that § 2 of the Voting Rights Act does not apply to state district judges.[3] A majority of seven judges, led by Judge Gee, held that § 2(b) of the Voting Rights Act (the vote dilution section) applies only to the election of "representatives" and therefore does not apply to judicial elections, thus overruling a previous Fifth Circuit panel opinion in *Chisom v. Roemer*, 839 F.2d 1056 (5th Cir), *cert. denied*, 488 U.S.____, 109 S. Ct. 390 (1988). Five judges, led by Judge Higginbotham, held that § 2(b) applies to judicial elections in general but that it does not apply to single-judge trial benches. Only Judge Johnson dissented. On November 21, 1989 the HLA timely filed its Petition for Writ of Certiorari.

ii. Statement of Facts

Judge Wood files this Statement of Facts to correct numerous serious misstatements of fact in the HLA's Petition. The HLA incorrectly claims that the Texas Constitution requires that state district judges be elected from districts no smaller than a county (Petition at 9) and that Texas' judicial election system is a numbered post, majority vote, "winner take all" judicial election system

3. The Plaintiffs did not appeal the district court's denial of their constitutional claims.

(Petition at 9), and it implies that each state district bench functions statewide by reason of statewide jurisdiction (Petition at 10). Contrary to Petitioners' implication, each state district court sits in a single-county or rural multi-county district with venue co-extensive with the electoral district, although jurisdiction technically extends to the State boundaries. Tex. Const. §§ 7 and 7(a)(f), App. at 1a-2a. In addition, Texas' Constitution § 7(a)(i) provides that district judge districts may be no smaller than a county *unless* a majority of the district's residents vote for smaller districts.[4] App. at 2a. Moreover, in inaccurately and incompletely characterizing Texas' judicial election system, Petitioners omit the fact that, although all Texas district courts are courts of general jurisdiction under the Texas Constitution, the district courts in the larger counties, including Harris County, are either statutorily or by agreement divided into four areas of specialized expertise: civil, criminal, family, and juvenile courts. Thus, district judges in the largest counties expressly run for and are elected to a specific civil, criminal, family, or juvenile specialty bench.

Petitioners also omit the fact that Texas has a partisan judicial election system. Under that system, both political parties hold primaries in accordance with the detailed requirements of the Texas Election Code. Candidates of each party run for specific courts; if no candidate receives a majority in the primary, the two leading candidates face each other in a runoff; the winner of each primary or

4. The Texas Constitution was amended in 1975 to include § 7(a)(i). One of the amendment's co-sponsors was then State Representative (now United States Representative) Craig Washington, a witness for the Plaintiffs in this lawsuit. See Pet. app. at 282a-283a. The district court concluded that the "apparent" rationale for § 7(a)(i) is "that District Judges should not be responsible to voters over an area smaller than an area over which they have primary jurisdiction." Pet. app. at 282a.

runoff then faces the other parties' candidates in the general election; and the winner of a plurality in the general election occupies the bench for four years. Each bench enjoys county-wide venue, jury selection, and docket equalization, and each judge enjoys independent authority as the sole decision-maker on each case that comes before him or her.

Not only do Petitioners mischaracterize the Texas district court system, they also grossly misrepresent the results of Texas state district judge elections.[5] Petitioners claim to have demonstrated that voting is "extremely racially polarized in Harris County." Petition at 11. To support this statement, Petitioners claim that "although 17 African American candidates have run for district judge in Harris County since 1980, only 2 won." Petition at 10-11. Petitioners further claim that white voters never gave more than 40% of their votes to black judicial candidates, while black voters gave 96% of their vote to black candidates. Petition at 11. Moreover, Petitioners claim, "Race also consistently outweighed party affiliation in district judge elections in Harris County." *Id.* Each of these statements either depends upon blatant statistical manipulation or is contradicted in the record.[6]

Petitioners' claim that they "demonstrated that voting is extremely racially polarized in Harris County" is mis-

5. At trial HLA presented only claims on behalf of blacks in Harris County, Texas' most populous county, and Judge Wood defended the Texas judicial election system against those claims. Accordingly, the factual and statistical claims about judicial voting patterns in the HLA's brief and in this brief are confined to Harris County.

6. In the Court of Appeals, Judge Wood urged several significant errors, regarding Plaintiffs' trial proof and the district court's evidentiary and legal findings. See appendix at 8a. In the unlikely event this Court reverses the Court of Appeals, remand would be necessary to present these issues—none of which were reached.

leading. Petitioners' expert, Dr. Richard Engstrom, analyzed only 17 selected contested black/white elections in Harris County since 1980. He ignored the three 1978 district judge elections in which blacks ran — and won — contested races against a white candidate. Two of those black judges have run — and won —every four years since 1978. Only one of those four races was contested: therefore, only that race was counted. In fact, blacks have run in 22 races in general elections for state district judge in Harris County since 1978 and have won 7 of those races — 4 contested and 3 uncontested — for a total success rate of 32% in all races, and 18% in contested races. *See* Exh. DW-1; R. 242. Moreover, 11 of the 15 losses were attributable to only four candidates: Weldon Berry, Sheila Jackson Lee, Freddie Jackson, and Matthew Plummer. Exh. DW-1. In addition, no black district judge candidate has lost in the Democratic primary since 1984. Exh. DW-2; R. 62. As to the 96% of their vote which black voters give to black candidates, the black vote is the same for white candidates so long as they are Democrats since 96% is the usual percentage of straight ticket Democratic votes cast by blacks in Harris County. TR. at 3-322. Also, in claiming that "[r]ace also consistently outweighed party affiliation in district judge elections in Harris County," Petitioners cite as proof the alleged fact that every white Democratic incumbent judge was reelected in 1986 while every black Democratic incumbent district judge lost the same election. Petition at 11. In fact, only *one* incumbent black Democratic district judge ran (and lost) a contested race in 1986 (newly appointed Judge Matthew Plummer), while two incumbent black judges ran uncontested races and won—Judges Thomas Routt and Jon Peavy. Exh. DW-1. Furthermore, although the percentage of black district judges currently sitting on the bench in Harris County is 5.1% of the total population of Harris County, as Petitioners state, blacks constitute only 3.8% of the attorneys in Harris County constitutionally qualified to run for state district judge.[7] Exh. D-4; R. 198. Thus, all of the facts which Petitioners cite to support their claim to have demonstrated "extreme racial polarization" in Harris County are either incorrect or manipulated.

Behind the HLA's Petition for Writ of Certiorari and not mentioned in that Petition, which properly focuses on statutory coverage, is an equally serious issue not reached by the Court of Appeals, of the proper standard of proof of vote dilution in partisan races. While the HLA's Petition poses a highly important statutory question, it is inaccurate and unfair to permit that question to be posed in the context of a seriously flawed statement of purported facts, which is actually designed to show that this case was correctly decided under the leading vote dilution case, *Thornburg v. Gingles*, 478 U.S. 30 (1986).

At trial Petitioners and Respondents urged and used different standards of proof of vote dilution. Petitioners confined their proof of alleged vote dilution in the target counties almost exclusively to two types of statistical proof — bivariate regression analysis and homogeneous precinct or "extreme case" analysis — which they used to show that in certain selected black/white races support for black judicial candidate rose as the per-

7. Judge Wood contended below that under the legal principle adopted by this Court in analogous Title VII cases, the relevant standard for measuring minority electoral success for an office open to only a small percentage of the electorate is the percentage of eligible candidates, not voters. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) and *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989).

centage of blacks in the precinct rose.[8] They excluded as irrelevant and prejudicial all evidence of actual practical local factors affecting the outcome of judicial races. By contrast, the Defendants' statistical expert, Dr. Delbert Taebel, analyzed the actual factors in Texas judicial races, relying for his statistical analysis on multivariate regression analysis, which factors political affiliation, as well as race, into the analysis of electoral results. Using this approach, Dr. Taebel established in undisputed testimony that Harris County voting is very competitive between Democrats and Republicans and election results are unpredictable. TR. 5-226. In addition, Judge Mark Davidson offered expert testimony on a race-by-race and election-by-election basis as to the totality of circumstances, which led to his conclusion that race was a relatively unimportant variable in Harris County judicial elections. Both Defendants' experts testified to the following factors: There is extensive straight-party voting. TR. 5-183; TR. 5-228. The swing voters, who constitute only 10-20% of the judicial voters, are a critical factor and vote in a variety of different ways. TR. 5-228-229. However, swing voting in Harris County has virtually nothing to do with race. TR. 5-232-233. The district court adopted the Plaintiffs' standard of proof and expressly rejected the Defendants' standard of proof and evidence as "irrelevant." Pet. app. at 222a.

8. Races where black Republicans won or lost without the support of the black community, largely because of straight ticket voting, were trteated as anomalies and ignored.

REASONS FOR DENYING THE WRIT

I. THE CLAIM THAT § 2(b) OF THE VOTING RIGHTS ACT APPLIES TO STATE DISTRICT JUDGES HAS BEEN RESOUNDINGLY REJECTED BY THE FIFTH CIRCUIT *EN BANC*.

This case has been fully briefed and argued below and was carefully considered and decisively ruled upon *en banc* by the Fifth Circuit Court of Appeals. The overwhelming consensus of that Court—which is perhaps this country's leading Court of Appeals in interpreting civil rights cases—is that state district judicial elections are beyond the scope of § 2(b) of the Voting Rights Act. Since the Court of Appeals had before it a full and complete record, since all constitutional and statutory issues have been fully explored by that Court *en banc*, and since the Court has overwhelmingly held that the statute does not apply and has set forth its reasons, there is no need for this Court to reconsider the same question that the Fifth Circuit has so resoundingly answered.

The Court should note and reject Petitioners' facile representation that "Section 5 and Section 2 have traditionally been interpreted to have concurrent application." That is untrue. In *South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1966) a Section 5 case, Chief Justice Warren carefully avoided that very question; and in Senate Report 97-417, Congress stated that an analogy between Sections 2 and 5 of the Voting Rights Act is "fatally flawed for several reasons." S. Rep. 97-417 at 42, 1987 U.S. Cong. & Admin. News at 177, 219-220. Judge Wood will discuss these issues more fully in response to the Petition for Writ of Certiorari filed by the original Plaintiffs.

II. IF THE COURT GRANTS CERTIORARI TO REVIEW THE APPLICATION OF § 2 OF THE VOTING RIGHTS ACT TO THE JUDICIARY, IT SHOULD GRANT CERTIORARI IN THIS CASE AND DENY CERTIORARI IN *CHISOM V. ROEMER.*

Petitioners have rushed to seek certiorari in *Chisom v. Roemer*, a § 2 case from Louisiana raising, like LULAC, the issue of the applicability of § 2 of the Voting Rights Act to judicial elections.[9] *See* Petition at 14. *Chisom* was the only other § 2 judicial election case to have been decided by the Fifth Circuit before *LULAC*. *Chisom v. Roemer*, 839 F.2d 1056 (5th Cir. 1988). It was expressly overruled by *LULAC*. This Court previously denied certiorari in *Chisom*, 488 U.S.____, 109 S. Ct. 390 (1988). Nothing new has been added to the *Chisom* record which would justify this Court's granting the Petition for Writ of Certiorari it previously denied. Since *Chisom* has been decisively overruled by the Fifth Circuit *en banc* and the case on remand was dismissed on the authority of LULAC, this Court should review *LULAC* if it reviews either case. It should not review *Chisom* and thereby complicate presentation of *LULAC*.

III. IF THE COURT GRANTS CERTIORARI IN THIS CASE IT SHOULD REVIEW ALL THE ISSUES RAISED OR REMAND UNREACHED STANDARD OF PROOF AND LEGAL ISSUES.

This case presents three vital questions, each of which has both statutory and Constitutional implications. The

9. The same national counsel represented Plaintiffs in *LULAC* and *Chisom*.

first two are variants on the same question: (1) whether § 2(b) applies to state judicial elections at all and (2) whether § 2 applies to the election of judges to independent benches of general jurisdiction; the third asks whether a standard of proof of vote dilution is proper if it excludes as "legally incompetent" virtually all evidence of the actual local factors operative in judicial elections and determines the existence of discrimination solely on the basis of statistical evidence of minority losses. The Fifth Circuit answered both of the first two of these questions affirmatively. Since it held that § 2 does not apply to judicial elections, it failed to reach the third issue. If this Court affirms the Court of Appeals, this issue will have to be resolved later. If, however, the Court should reverse and decline to review this important third issue it will remain an unresolved issue which should be addressed in some fashion. Respondent Judge Wood therefore urges the Court at least to review, if not to decide, the standard of proof issue if it decides to grant certiorari in this case. She has therefore listed in the Appendix at 8a additional questions presented in the case which were not reached by the Fifth Circuit

Similarly, the subsidiary issues which have been briefed and argued below will require resolution should this case be reviewed. For example, the question whether the principle of one-man, one-vote applies to judicial elections is integral to this case and has already shown its practical significance. Although § 2 derives its legitimacy from the fourteenth and fifteenth amendments to the United States Constitution, and although the principle of one-man, one-vote was first enunciated and applied to the election of "representatives" in *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964), a fourteenth amend-

ment and vote dilution case, both the Plaintiffs and the district court, on the authority of *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972) *aff'd*, 409 U.S. 1095, 93 S. Ct. 904 (1973), denied that the principle of one-man, one-vote applies to judicial elections. They thus felt free to devise a remedial plan, for instance, which assigned two state judicial judges to each minority/Democratic district and one to each white/Republican district. Judge Wood sees a clear fourteenth amendment problem in that "solution." Indeed, one wonders how § 2 vote dilution can be measured at all if one man, one vote does not require essentially equal numbers of voters in judicial electoral districts, if only for comparative purposes.[10] The subsidiary issues raised below, therefore, should either be addressed by this Court if it decides to grant certiorari or made the subject of remand.

CONCLUSION

For the foregoing reasons, Respondent Harris County District Judge Sharolyn Wood requests that the Court deny the Houston Lawyers' Association's Petition for Writ of Certiorari or, in the alternative, that it grant certiorari to determine only those issues, and all of those issues which are properly presented by the record in this case.

10. Judge Wood agrees that the principle of one-man, one-vote does not apply to judicial elections--but only because judges are servants of the people, not representatives, and judicial districts therefore are not drawn to ensure equal representation of racial groups but to equalize case load and promote the fair and efficient administration of justice.

Respectfully submitted,

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APPENDIX

§ 7. *Judicial Districts; District Judges; terms or sessions; absence, disability or disqualification of Judge*

Sec. 7. The State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution. Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who has resided in the district in which he was elected for two (2) years next preceding his election, and who shall reside in his district during his term of office and hold his office for the period of four (4) years, and who shall receive for his services an annual salary to be fixed by the Legislature. The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law. He shall hold the regular terms of his Court at the County Seat of each County in his district in such manner as may be prescribed by law. The Legislature shall have power by General or Special Laws to make such provisions concerning the terms or sessions of each Court as it may deem necessary.

The Legislature shall also provide for the holding of District Court when the Judge thereof is absent, or is from any cause disabled or disqualified from presiding.

§ 7a. *Judicial Districts Board; reapportionment of judicial districts*

Sec. 7a. (a) The Judicial Districts Board is created to reapportion the judicial districts authorized by Article V, Section 7, of this constitution.

. . .

(i) The legislature, the Judicial Districts Board, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this section. Judicial districts smaller in size than the entire county may be created subsequent to a general election where a majority of the persons voting on the proposition adopt the proposition "to allow the division of _____ County into judicial districts composed of parts of _____ County." No redistricting plan may be proposed or adopted by the legislature, the Judicial Districts Board, or the Legislative Redistricting Board in anticipation of a future action by the voters of any county.

§ 1973c. *alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court*

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the

effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment to person shall be denied the right to vote for failure to comply with cedure: Provided, That such qualification, prerequisite, cedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate and expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Due Process Clause of Section1 are set out in this volume and the following volume. See preceding volume for materials pertaining to the Citizenship and Privileges and Immunities Clauses of that section and the volume containing the end of the Constitution for materials pertaining to the Equal Protection Clause of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or

other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV—UNIVERSAL MALE SUFFERAGE

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

OTHER QUESTIONS PRESENTED

1. Whether the concept of one-man, one-vote applies to judicial elections?

2. Whether the eligible pool of minority lawyers or that of minority voters is the appropriate reference point for measuring minority success in judicial elections?

3. Whether two of the three threshold *Gingles* factors in vote dilution cases—racially polarized voting and white racial bloc voting—are proved by abstract statistical inquiry, with all other inquiry into the actual local factors determining the results of elections being irrelevant?

4. Whether a court-ordered remedial plan for vote dilution that assigns two judges to each minority/majority district and one judge to each white/majority district violates the fourteenth and fifteenth amendments to the United States Constitution?

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

Nos. 90-813, 90-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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RELEVANT DOCKET ENTRIES

Date	No.	Description
7/11/88	1	Complaint filed and 15 summonses issued (sm)
8/15/88	2	Amended complaint by LULAC-Council 4434, LULAC-Council #4451, Christina Moreno, Aquilla Watson, LULAC (Statewide) James Fuller, Matthew W. Plummer Sr. amending complaint [1-1] [Entry date 8/17/88]
9/27/88	7	Answer by William P. Clements, Jim Mattox, Jack M. Rains, Thomas R. Phillips, John F. Onion Jr., Joe E. Kelly, Joe B. Evins, Sam B. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, Joe Spurlock II (sm)
11/30/88	17	Motion by Midland County to intervene (sm) [Entry date 12/1/88]
1/11/89	20	Motion by LULAC-Council 4434, LULAC-Council #4451. Christina Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. to dismiss as to defendant William Clements only (sm)
1/12/89	23	Order granting motion to dismiss as to defendant William Clements only [20-1] (sm)

1/23/89	24	Motion by Houston Lawyers Asso to intervene (sm)
1/23/89		Received Complaint in intervention of Houston Lawyers Association (sm)
1/30/89	28	Motion by Dist Jdgs of Travis with memorandum in support to intervene (sm) [Entry date 1/31/89]
1/30/89		Received answer of District Judges of Travis County (sm) [Entry date 1/31/89]
1/31/89	29	Motion by Fred Tinsley, Joan Winn White, Jesse Oliver to intervene (sm)
2/1/89	30	Response by Jim Mattox, Jack M. Rains, Thomas R. Phillips, John F. Onion Jr., Ron Chapman, thomas J. Stovall Jr., James F. Clawson Jr., Joe E. Kelly, Joe B. Evins, Sam B. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, Joe Spurlock II to motion to intervene [24-1] (sm) [Entry date 2/2/89]
2/3/89	31	Response by LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. to motion to intervene [24-1] (sm)
2/9/89	32	Response by Jim Mattox, Jac, M. Rains, Thomas R. Phillips, John F. Onion Jr., Ron Chapman, Thomas J. Stovall Jr., James F. Clawson Jr., Joe E. Kelly, Joe B. Evins, Sam B.

		Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, Joe Spurlock II to motion to intervene [29-1], motion to intervene [28-1] (sm)
2/13/89	34	Response by LULAC-Council 4434, LULAC Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. to motion to intervene [28-1] (sm)
2/13/89	35	Response by LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. to motion to intervene [29-1] (sm)
2/21/89	40	Motion by Sharolyn Wood to intervene (sm)
2/27/89	45	Motion by F. Harold Entz to intervene (sm)
3/6/89	50	Order granting motion to intervene [45-1], granting motion to intervene [29-1], granting motion to intervene [28-1], granting motion to intervene, [24-1], granting motion to intervene, [17-1] (sm) [Entry date 3/7/89]
3/21/89	55	Answer by Sharolyn Wood to Houston Lawyers Assoc. (sm)
3/21/89	56	Answer to complaint by Sharolyn Wood against Legislative Black Caucus, LULAC-Council 4434, LULAC-Council #4451, Cristina

		Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. (sm)
4/6/89	61	Motion by Legislative Black Caucus to intervene as plaintiffs (sm)
4/6/89		Received complaint in intervention of Legislative Black Caucus of Texas
4/13/89	69	Order granting motion to intervene as plaintiffs [61-1] (sm)
5/12/89	85	Second Amended Complaint by LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide) Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Mary Ellen Hicks, Rev. James Thomas (sm)
5/24/89	100	Answer of Jim Mattox, Jack M. Rains, Thomas R. Phillips, John F. Onion Jr., Ron Chapman, Thomas J. Stovall Jr., James F. Clawson Jr., Joe E. Kelly, Joe B. Evins, Sam B. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, Joe Spurlock II to Second Amended Complaint of LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide) Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M.

		Hogrobrooks, Ernest M. Deckard, Mary Ellen Hicks, Rev. James Thomas (sm)
5/24/89	101	First Amended Answer of F. Harold Entz to Second Amended Complaint of LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide) Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Mary Ellen Hicks, Rev. James Thomas (sm)
5/24/89	102	Answer of F. Harold Entz to complaint of Fred Tinsley, Joann Winn White, and Jesse Oliver
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		to Certify the Opinion and Order of November 8, 1989 for Interlocutory Appeal, denying a stay in the proceedings, denying motion to intervene (sm)
1/11/90	331	Order amending order of January 2, 1990 (sm)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

---x

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), *et al.*,

PLAINTIFFS

Houston Lawyers' Association
Alice Bonner, Weldon Berry, Francis Williams,
Rev. William Lawson, Deloyd T. Parker,
Bennie McGinty

PLAINTIFF-INTERVENORS

vs.

No. 88-CA-154

WILLIAM CLEMENTS, Governor of the State of Texas, JIM MATTOX, Attorney General of the State of Texas; JACK RAINS, Secretary of the State of Texas, All in their official capacities;
THOMAS R. PHILLIPS; JOHN F. ONION, JR.; RON CHAPMAN; THOMAS J. STOVALL, JR.; JAMES F. CLAWSON, JR.; JOE E. KELLY; JOE B. EVINS; SAM B. PAXSON; WELDON KIRK; CHARLES J. MURRAY; RAY D. ANDERSON; JOE SPURLOCK II, All in their official capacities as members of the Judicial Districts Board of the State of Texas,

DEFENDANTS.

---X

COMPLAINT IN INTERVENTION

Introduction

1. This action is brought by five Black registered voters and a membership organization of Black attorneys and registered voters in Harris County, Texas, who seek to intervene in MO 88 CA-154, *LULAC v. Clements*, for the purpose of protecting their interests as Black voters in being able to participate equally in the political process and elect candidates of their choice in Harris County district judge elections. They allege that the at large judicial electoral districts scheme as currently constituted, denies Black citizens an equal opportunity to elect the candidates of their choice, in violation of section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments of the United States Constitution. They also allege that Art. 5, §7(a)i of the Constitution of the State of Texas was adopted with the intention, and/or has been maintained for the purpose of minimizing the voting strength of Black voters, in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, 42

U.S.C. §1983 and section II of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973. Plaintiff-intervenors seek declaratory and injunctive relief enjoining the continued use of the current judicial electoral districts scheme.

Jurisdiction

2. This Court has jurisdiction pursuant to 28 U.S.C. 1331 and 1343 and 42 U.S.C. § 1973j(f). This is an action arising under the statutes and Constitution of the United States and an action to enforce statutes and constitutional provisions that protect civil rights, including the right to vote.

3. Plaintiffs seek declaratory and other appropriate relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

Parties

4. Plaintiff-intervenor Houston Lawyers' Association is a member organization of seventy Black attorneys who reside in the Harris County area, each of whom is a registered voter, qualified to vote for district judges in Harris County. As part of its organizational mission, the Houston Lawyers'

Association has worked to promote the fair representation of Blacks in the judiciary in Harris County.

5. Plaintiff-intervenor Weldon Berry is an adult Black citizen of the United States who resides in Harris County, Texas. He is registered to vote, and is qualified to vote for district judges in Harris County. He was an appointed district judge who lost in an at large election in Harris County, Texas.

6. Plaintiff-intervenor Francis Williams is an adult Black citizen of the United States who resides in Harris County, Texas. He is registered to vote and is qualified to vote for district judges in Harris County. He was an appointed district judge who lost in an at large election in Harris County, Texas.

7. Plaintiff-intervenor Alice A. Bonner is an adult Black citizen of the United States who resides in Harris County, Texas. She is registered to vote, and is qualified to vote for district judges in Harris County. She was an appointed district judge who lost in an at large election in Harris County, Texas.

8. Plaintiff-intervenor William Lawson is an adult Black citizen of the United States who resides in Harris County, Texas. He is registered to vote, and qualified to vote for district judges in Harris County.

9. Plaintiff-intervenor Deloyd T. Parker, Jr. is an adult Black citizen of the United States who resides in Harris County, Texas. He is registered to vote, and qualified to vote for district judges in Harris County.

10. Plaintiff-intervenor Bennie McGinty is an adult Black citizen of the United States who resides in Harris County, Texas. She is registered to vote, and qualified to vote for district judges in Harris County.

11. Defendant William Clements is a white adult resident of the State of Texas. He is sued in his official capacity as Governor of the State of Texas. In his capacity as Governor, defendant Clements is the chief executive officer of the state and as such is charged with the responsibility to see that the laws of the State are faithfully executed.

12. Defendant Jack Rains is a white adult resident of the State of Texas. He is sued in his official capacity as

Secretary of State of the State of Texas. In his capacity as Secretary of State, he is the chief elections officer of the state and as such is charged with the responsibility to administer the election laws of the state. The Secretary of State is further empowered under the Texas Election Code, Section 31.005, to take appropriate action to protect the voting rights of the citizens of Texas from abuse.

13. Defendant Jim Mattox is a white adult resident of the State of Texas. He is sued in his official capacity as Attorney General of the State of Texas. In his capacity as Attorney General he is the chief law enforcement officer of the state, and as such is charged with the responsibility to enforce the laws of the state.

14. Defendants Thomas R. Phillips, John F. Onion, Ron Chapman, Thomas J. Stovall, James F. Clawson, Jr., Joe E. Kelly, Joe B. Evins, Sam M. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, and Joe Spurlock, II, are members of the Texas Judicial Districts Board, which was created by Art. 5, Sec. 7a of the Texas Constitution in 1985. The Judicial Districts Board is required to enact statewide

reapportionment if the legislature fails to do so, after each federal decennial census. In addition to statewide reapportionment, the Judicial Districts Board may reapportion the judicial districts of the state as the necessity arises in its judgment. The Judicial Districts Board is comprised of twelve *ex officio* members, and one lawyer member appointed by the Governor of the State of Texas. No member of the Texas Judicial Districts Board has ever been Black.

Factual Allegations

15. Texas has a history of official discrimination that touched the right of Black citizens to register, to vote, and otherwise to participate in the democratic process.

16. Primary elections were restricted to whites in Texas until a Black resident of Houston successfully challenged this discriminatory practice before the Supreme Court of the United States in 1944.

17. The Texas Legislature created a state poll tax in 1902 which helped to disenfranchise Black voters until the use of poll taxes was outlawed by the Supreme Court of the United

States in 1966.

18. It has been estimated that the poll tax and white primary reduced the number of Blacks participating in Texas elections from approximately 100,000 in the 1890's to 5,000 by 1906.

19. The State of Texas, and its political subdivisions are covered by Section 5 of the Voting Rights Act of 1965, as amended, the special administrative preclearance provision for monitoring all State and local voting changes.

20. Elections in Texas in general, and Harris County in particular, are characterized by significant racial bloc voting. In such elections, white voters generally vote for white candidates and Black voters generally vote for Black candidates. The existence of racial bloc voting dilutes the voting strength of Black voters where they are a minority of the electorate.

21. Texas has traditionally used, and continues to use unusually large election districts, particularly in large metropolitan areas such as Harris County, which have large concentrations of minority voters.

22. The political processes leading to nomination or election in Texas in general, and Harris County in particular, are not equally open to participation by Blacks, in that Blacks have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. For example, Black citizens continue to bear the effects of pervasive official and private discrimination in such areas of education, employment and health, which hinders their ability to participate in the political process.

23. According to the 1980 Census, Texas had a total population of 14,228,383. Blacks comprise approximately 12 percent of the State's population.

24. No Black attorney has ever served on the Texas Supreme Court or on the Texas Court of Criminal Appeals.

25. District judges in Texas are elected in an exclusionary at large numbered place system.

26. Only 2% of district judges in Texas are Black. One (1) percent of the State's appellate justices are Black.

27. Harris County is made up of 27 cities in southeastern

Texas, of which Houston is the largest. Houston is the largest city in Texas. The population of Houston is approximately 1,728,910. The Black population of Houston is 440,346.

28. Harris County covers 1,723 square miles. According to the Texas Data Center, in 1987 the population of Harris County was 2,782,414. Blacks comprise approximately 19.5% of the Harris County population.

29. The voting age population of Harris County is 1,685,081. Eighteen (18) percent of the voting age population in Harris County is Black.

30. Harris County is served by fifty-nine (59) district judges. This is the largest number of district judges of any judicial district in Texas. Harris County is also the largest judicial district by population.

31. In recent years Black candidates have run for district judge in almost every general election in Harris County, yet only 4 judges out of 59 (6.7% of the district judges), are Black.

32. In the November 1988 General Election for example,

six Black candidates ran for twenty-five (25) contested district judge positions. All six Black candidates lost, despite overwhelming Black voter support. Similarly, in the November 1986 General Election, of ten Black candidates who ran in twenty (20) contested races, eight lost, despite overwhelming support from Black voters.

33. Justices of the Peace are elected from single member precincts within Harris County. There are 2 Black Justices of the Peace in Harris County, elected from a precinct with a majority Black voting age population.

34. There is a substantial degree of residential segregation by race in Harris County.

35. Blacks in Harris County are a politically cohesive, geographically insular minority and the judicial candidates they support are usually defeated by a bloc voting white majority.

36. Plaintiff-intervenor reallege the contents of paragraphs of 11-29 of Plaintiffs' First Amended Complaint, as they relate to Harris County, Texas.

37. In 1985, Art. 5 §7 of the Texas Constitution of 1876

was amended to include §7(a), which created the Judicial Districts Board and provided in relevant part that:

> The legislature, the Judicial Districts Boards, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this Section. Vernon's Ann. Tex. Const. Art. 5, §7(a)i.

38. Prior to the 1985 amendment, the Texas Constitution provided that "The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law." Art. 5, §7, Texas Constitution of 1876.

39. Although all counties in Texas have more than one district judge, no county in Texas holds elections for single member judicial districts. All districts judges in Texas run in exclusionary at large, winner take all, numbered place elections.

40. This electoral practice dilutes the voting power of politically cohesive, geographically insular communities of Black voters which could constitute effective voting majorities in single member districts.

41. Using 1980 census figures, it would be possible to draw at least eleven single member geographically compact districts of equal population in which the majority of the voting age population is Black.

42. In the alternative, the failure to use a non-exclusionary at large election system for district judges, dilutes the voting strength of Black voters. The use of a non-exclusionary at large voting system could afford Blacks an opportunity to elect judicial candidates of their choice. For example, under an at large system utilizing limited or cumulative voting, Black voters would have a more equal opportunity to elect district judges.

Allegations Regarding Intervention

43. On July 11, 1988 plaintiffs filed an action on behalf of Mexican-American and Black plaintiffs challenging the district judges schemes in forty-four (44) counties throughout Texas, including Harris County.

44. Plaintiff-intervenors seek to intervene in this action, pursuant to Rule 24 (a) of the Fed. Rule Civ. Procedure, in order to protect the interests of Black plaintiffs in the Harris

County area, who will be affected by a decision in this case. They are entitled to intervene as a matter of right because their application is timely, disposition of the action may impair or impede the ability of Black voters to protect their interest in ensuring that the method of electing district judges in Harris County is equally open to Black citizens, and the proposed-intervenors are not adequately represented by existing parties.

First Claim for Relief

45. Plaintiffs reallege the contents of paragraphs 1-42.

46. The present districting scheme for Texas district judges was adopted with the intention and/or has been maintained for the purpose of minimizing the political strength of Black voters in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. §1973, and 42 U.S.C. § 1983.

Second Claim for Relief

47. Plaintiffs reallege the contents of paragraphs 1-42.

48. The present districting scheme for Texas district judges

has the result of making the political processes leading to nomination and election less open to participation by Black voters in that they have less opportunity than other citizens to elect the candidates of their choice, and thereby violates section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. §1973.

Relief

WHEREFORE, plaintiffs ask this Court to enter a judgment:

1. Granting plaintiffs request to intervene in this action;

2. Declaring that the present districting scheme for electing Texas district judges violates the Fourteenth and Fifteenth Amendments to the Constitution, section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, and 42 U.S.C. § 1983;

3. Ordering defendants to develop and establish a scheme for electing district judges that fully remedies the dilution of plaintiff-intervenors voting strength and provides Black voters with an equal opportunity to elect the candidates of their choice;

4. Granting plaintiff-intervenors their taxable costs in this action, necessary expenses of the litigation, and reasonable attorney's fees; and

5. Providing such other relief as the Court finds just.

Respectfully submitted,

January 19, 1988

[Caption]

COMPLAINT IN INTERVENTION

I. Introduction

1. Intervenors/plaintiffs Jesse Oliver, Fred Tinsley and Joan Winn White ("Intervenors") are former state district judges of Dallas County, and are Black citizens of the State of Texas. They bring this action pursuant to 42 U.S.C. Section 1971, 1973, 1983 and 1988 to redress a denial, under color of state law, of rights, privileges or immunities secured to plaintiffs by the said laws and by the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

2. Plaintiffs seek a declaratory judgment that the existing at large scheme of electing district judges in Dallas County of the State of Texas violates plaintiffs' civil rights in that such method illegally and/or unconstitutionally dilutes the voting strength of Mexican-American and Black electors; plaintiffs seek a permanent injunction prohibiting the calling, holding, supervising or certifying any future elections for

district judges under the present at large scheme in Dallas County; plaintiffs seek the formation of a judicial districting scheme by which district judges in the target counties are elected from districts are single member districts; plaintiffs seek costs and attorneys' fees.

II. Jurisdiction

3. Jurisdiction is based upon 28 U.S.C. 1343(3) and (4), upon causes of action arising from 42 U.S.C. Section 1971, 1973, 1983, and 1988, and under the Fourteenth and Fifteenth Amendments to the United States Constitution. Declaratory relief is authorized by 28 U.S.C. Section 2201 and 2202 and by Rule 57, F.R.C.P.

III. Plaintiffs/Intervenors

4. Plaintiffs Jesse Oliver, Fred Tinsley and Joan Winn White are Black citizens and registered voters of Dallas County, Texas. They are qualified to vote for district judges of Dallas County. Plaintiffs were appointed district judges who lost an at large election to a white opponent in Dallas County, Texas.

IV. Defendants

5. Defendant William Clements is the Governor of the State of Texas, and is the chief executive officer of the state and as such is charged with the responsibility to execute the laws of the state. Defendant Jim Mattox is the Attorney-General of the State of Texas, and is the chief law enforcement officer of the state and as such is charged with the responsibility to enforce the laws of the state. Defendant Jack Rains is the Secretary of State of the State of Texas, and is the chief elections officer of the state and as such is charged with the responsibility to administer the election laws of the state. Defendants Thomas R. Phillips, John F. Onion, Ron Chapman, Thomas J. Stovall, James F. Clawson, Jr., Joe E. Kelly, Joe B. Evins, Sam M. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, and Joe Spurlock, II are members of the Judicial Districts Board created by Article V, Section 7a of the Texas Constitution, and pursuant to Article 24.941ff, Texas Revised Civil Statutes, have the duty to reapportion judicial districts within the State of Texas.

V. Factual Allegations

6. District judges are elected either from judicial districts which are coterminous with and wholly contained within a county, or from judicial districts which may be composed of several entire counties.

7. In those counties which contain more than one judicial district, the present election system is an at large scheme with the equivalent of numbered places, the majority rule requirement, and staggered terms.

8. The following counties upon information and belief, contain multiple judicial districts and a sufficiently compact minority population for the drawing of at least one majority combined minority single member district.

Harris	Lubbock
Dallas	Fort Bend
Ector	Smith
McClennan	Brazos
Tarrant	Brazoria
Midland	Taylor
Travis	Wichita
Jefferson	Angelina
Galveston	Gregg
Bell	

9. The above counties contain some 190 judicial

districts, and a combined minority population of almost 30%; however, only 10 or 5.3% of the 190 district judges are minority.

10. The following counties contain multiple judicial districts and sufficient Black population for the drawing of at least one majority-Black single member district:

Harris	Galveston
Dallas	Smith
Tarrant	Bell
Jefferson	McClennan
Travis	Gregg
Brazos	Fort Bend

11. The above counties contain some 164 judicial districts, and a Black population of 16.4%; however, only 7 or 4.3% of the 164 district judges are Black.

12. The following counties contain multiple judicial districts and sufficient Hispanic population for the drawing of at least one majority-hispanic single member district:

Harris	Ector
Tarrant	Lubbock
Galveston	Fort Bend
Dallas	
Travis	

13. The above counties contain some 148 judicial

districts, and a Hispanic population of 15.4%; however, only 4 or 2.7% of the 148 district judges are Hispanic.

14. The following judicial districts contain multiple counties and sufficient minority population for the drawing of at least one majority-minority single member districts:

Judicial District	*County*
81st, 218th	Atascosa, Frio, Karnes, LaSalle & Wilson
36th 156th, 343rd	Aransas, Bee, Live Oak, McMullen & San Patricio
22nd, 207th	Caldwell, Comal & Hays
24th, 135th, 267th	Calhoun, DeWitt, Goliad, Jackson, Refugio & Victoria
64th, 242nd	Castro, Hale & Swisher
34th, 205th, 210th	Culberson, El Paso & Hudspeth

15. The above counties contain some 15 judicial districts, and a combined minority population of 44.32%; however, only 1 or 6.7% of the 15 district judges is Black or Hispanic.

16. The following judicial districts contain multiple

counties and sufficient hispanic population for the drawing of at least one majority-hispanic single member district:

Judicial District	*County*
81st, 218th	Atascosa, Frio, Karnes, LaSalle & Wilson
36th, 156th, 343rd	Aransas, Bee, Live Oak, McMullen & San Patricio
24th, 135th, 267th	Calhoun, DeWitt, Goliad, Jackson, Refugio & Victoria
64th, 242nd	Castro, Hale & Swisher
34th, 205th, 210th	Culberson, El Paso & Hudspeth

17. The above counties contain some 13 judicial districts, and a hispanic population of 42.77%; however, only 1 or 7.7% of the 13 district judges is hispanic.

18. Upon information and belief, if single members districts were drawn in the above named areas, the minority group is sufficiently large and compact so that districts could be drawn in which minorities would constitute a majority.

19. Upon information and believe, in the above named areas minorities are politically cohesive.

20. Upon information and belief in the above cited areas, the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as the minority candidate running unopposed -- usually to defeat the minority's preferred candidate.

21. Upon information and belief, in the above challenged areas, the at large election scheme interacts with social and historical conditions to cause an in-equality in the opportunity of hispanic or black voters to elect representatives of their choice as compared to white voters.

22. Depending upon the evidence developed in discovery, some of the above named areas may be deleted and some unnamed areas may be added.

VI. Causes of Action

23. The present at large scheme of electing district judges, intentionally created and/or maintained with a discriminatory purpose, violates the civil rights of plaintiffs by diluting their votes.

24. The present at large scheme of electing district judges results in a denial or abridgement of the right to vote

of the plaintiffs on account of their race or color in that the political processes leading to nomination or election of district judges are not equally open to participation by plaintiffs in that they have less opportunity than other members of the electorate to elect candidates of their choice.

VII. Immunities

25. Qualified and absolute immunity do not protect the defendants because plaintiffs seek only injunctive and declaratory relief and attorneys' fees. Furthermore, absolute immunity does not protect defendants because they do not act in any of the capacities which receive immunity at common law. The defendants are not entitled to Eleventh Amendment immunity because plaintiffs seek only injunctive and declaratory relief and attorneys' fees.

VIII. Equities

26. Plaintiffs have no adequate remedy at law other than the judicial relief sought herein, and unless the defendants are enjoined from continuing the present at large scheme, plaintiffs will be irreparably harmed by the continuing violation of their statutory and constitutional

rights. The illegal and unconstitutional conditions complained of preclude the adoption of remedial provisions by the electorate. The present electoral scheme is without any legitimate or compelling governmental interest and is arbitrarily and capriciously cancels, dilutes and minimizes the force and effect of the plaintiffs' voting strength.

IX. Attorneys' Fees

27. In accordance with 42 U.S.C. Section 1973-1(e) and 1988, plaintiffs are entitled to recover reasonable attorneys' fees as part of their costs.

X. Prayer

28. WHEREFORE, premises considered, plaintiffs pray that defendants be cited to appear and answer herein; that a declaratory judgment be issued finding that the existing method of electing district judges is unconstitutional and/or illegal, null and void; that the defendants be permanently enjoined from calling, holding, su[illegible]vising or certifying any further elections for district judges under the present at large scheme; that the Court order that district judges in the targeted counties be elected in a system which

contains single member districts; adjudge all costs against defendants, including reasonable attorneys' fees; retain jurisdiction to render any and all further orders that this Court may from time to time deem appropriate; and grant any and all further relief both at law and in equity to which these plaintiffs may show themselves to be entitled.

Respectfully submitted,

[Caption]

DEFENDANT HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD'S ORIGINAL ANSWER TO *HOUSTON LAWYERS' ASSOCIATION*

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendants Sharolyn Wood, Judge of the 127th Judicial District Court of Harris County, Texas ("Wood") and, subject to her Motion to Dismiss and Motion for More Definite Statement, files this her Original Answer in response to the Complaint in Intervention of the Houston Lawyers' Association, Alice Bonner ("Bonner"), Weldon Berry ("Berry"), Francis Williams ("Williams"), Rev. William Lawson ("Lawson"), Deloyd T. Parker ("Parker"), and Bennie McGinty ("McGinty") (hereinafter collectively referred to as the "Houston Lawyers' Association Plaintiffs") in the above referenced cause of action as follows:

I.

BACKGROUND

1.1. This is a suit originally brought by the League of Latin American Citizens ("LULAC") and certain individual Mexican-American and black citizens of Texas seeking to

declare illegal and/or unconstitutional and null and void in certain targeted counties the State of Texas' constitutionally and legislatively mandated system of electing state district judges at large.

1.2. The Texas Constitution Article V, § 7 provides in relevant part that the state shall be divded into judicial districts with each district having one or more judges as provided by law or by the Texas Constitution. The section also provides that each district judge shall be elected by the qualified voters at a general election and shall be a citizen of the state and shall have been a practicing lawyer in the state or a judge of a state court for four years and shall have been a resident of the district for two years and shall agree to reside in the district during his term of office.

1.3. In 1985, the Texas Constitution was amended by the addition of a new section, article V, § 7a, which provides for the reapportionment of Texas judicial election districts. That section provides that no judicial district may be established smaller than an entire county except by majority vote of the voters at a general election. Tex.

Const. of 1876, art. V, § 7a(i).

1.4. Pursuant to article V, the Texas legislature has enacted a comprehensive body of statutes governing the formation and function of judicial districts. The policy underlying the establishment of judicial districts is expressly stated in those statutes, to wit:

> It is the policy of the state that the administration of justice shall be prompt and efficient and that, for this purpose, the judicial districts of the state shall be reapportioned as provided by this subchapter so that the district courts of various judicial districts have judicial burdens that are as nearly equal as possible.

Tex. Gov't Code § 24.945.

1.5. To promote the ends of fairness and efficiency, all the district courts in a county with more than one judicial district are accorded concurrent jurisdiction and courts in those districts are permitted to equalize their dockets. Tex. Gov't Code §§ 24.950, 24.951.

1.6. In addition, the Texas Government Code sets out rules and conditions for the reapportionment of judicial

districts.[1] Those statutes expressly require that the

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[1] The Tex. Gov't Code provides,

> (a) The reapportionment of the judicial districts of the state by the board is subject to the rules and conditions provided by Subsections (b)-(d).
>
> (b) Reapportionment of the judicial districts shall be made on a determination of fact by the board that the reapportionment will best promote the efficiency and promptness of the administration of justice in the state by equalizing as nearly as possible the judicial burdens of the district courts of the various judicial districts. In determining the reapportionment that best promotes the efficiency and promptness of the administration of justice, the board shall consider:
>
> (1) the numbers and types of cases filed in the district courts of the counties to be affected by the reapportionment;
>
> (2) the numbers of types of cases disposed of by dismissal or judgment in the district courts of those counties;
>
> (3) the numbers and types of cases pending in the district courts of those counties;
>
> (4) the number of district courts in those counties;
>
> (5) the population of the counties;
>
> (6) the area to be covered by

a judicial district; and

(7) the actual growth or decline of population and district court case load in the counties to be affected.

(c) Each judicial district affected by a reapportionemnt must contain one or more complete counties except as provided by this section. More than one judicial district may contain the same county or counties. If more than one county is contained in a judicial district, the territory of the judicial district must be contiguous.

(d) Subject to the other rules and conditions in this section, a judicial district in a reapportionment under this subchapter may:

(1) be enlarged in territory by including an additional county or counties in the district, but a county having a population as large or larger than the population of the judicial district being reapportioned may not be added to the judicial district;

(2) be decreased in territory by removing a county or counties from the district;

(3) have both a county or counties added to the district and a county or counties removed from it; or

(4) be removed to another location in the state so that the district contains an entirely different county or counties.

(e) The legislature, the Judicial Districts

reapportionment of state judicial election districts be made on that basis which "will best promote the efficiency and promptness of the administration of justice in the state by equalizing as nearly as possible the judicial burdens of the district courts of the various judicial districts." The Code further sets out the factors to be considered in determining which reapportionment best promotes the efficiency and promptness of the administration of justice.

1.7. Not only are both race and racial discrimination entirely alien to Texas' judicial district reapportionment policy and the factors enumerated under it, but both the statement of policy itself and the enumerated factors to be considered make it absolutely clear that the fundamental state

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Board, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this subsection. Judicial districts smaller in size than the entire county may be created subsequent to a general election in which a majority of the persons voting on the proposition adopt the proposition "to allow the division of _____ County into judicial districts composed of parts of _____ County." A redistricting plan may not be proposed or adopted by the legislature, the Judicial Districts Board, or the Legislative Redistricting Board in anticipation of a future action by the voters of any county.

policy that determines the apportionment of judicial districts is the vitally important policy of promoting efficiency, promptness, and fundamental fairness in the administration of justice in Texas. Plaintiffs, however, would simply disregard this compelling state policy in the interests of increasing the numbers of protected minority class members in the state judiciary. Indeed, Plaintiffs expressly state that "the present electoral scheme is without any legitimate or compelling governmental interest and it arbitrarily and capriciously cancels, dilutes, and minimizes the force and effect of the Plaintiffs' voting strength." Plaintiffs' First Amended Complaint at ¶ 31.

1.8. Despite their claim that the present judicial election scheme is without any legitimate foundation, Plaintiffs state no claim against Texas' judicial election scheme in general. Rather, they complain that Texas' state judicial districts were established and/or are maintained in certain target counties with the intent to discriminate against minorities protected by § 2 of the Voting Rights Act, and that the district judge election scheme in those counties

dilutes the votes of blacks and Hispanics and thereby violates the Voting Rights Act, 42 U.S.A. §§ 1971 and 1973, the Civil Rights Act, U.S.C. §§ 1983 and 1988, and the fourteenth and fifteenth amendments to the United States Constitution. Plaintiffs' Complaint is essentially that when the target counties, which are widely scattered over the State of Texas, are considered as an aggregate, the proportional representation of black and/or Hispanic judges in those counties is less than the proportion of minorities in the gross population of those aggregated counties.

1.9. This suit initially challenged the judicial election system in 47 Texas counties.[2] By agreement between Plaintiffs and the State of Texas, approved by the Court on oral motion of the parties at a hearing on various motions to intervene on February 27, 1989, the number of targeted

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[2] The counties targeted initially were Harris, Dallas, Ector, McLennan, Tarrant, Midland, Travis, Jefferson, Galveston, Bell, Lubbock, Fort Bend, Brazos, Brazoria, Taylor, Wichita, Angelina, Gregg, Smith, Atascosa, Frio, Karnes, LaSalle, Wilson, Aransas, Bee, Live Oak, McMullen, San Patricio, Caldwell, Comal, Hays, Calhoun, DeWitt, Goliad, Jackson, Refugio, Victoria, Castro, Hale, Swisher, Culberson, El Paso, and Hudspeth.

counties was reduced to 15. These counties are Harris, Dallas, Ector, McLennan, Tarrant, Midland, Travis, Jefferson, Galveston, Lubbock, Fort Bend, Smith, Culberson, El Paso, and Hudspeth.

II.

DEFENSES

2.1. Defendant Wood is without knowledge as to whether the individual Houston Lawyers' Association Plaintiffs are black registered voters as alleged in paragraph 1 of the Houston Lawyers' Association Plaintiffs' Complaint in Intervention (the "Houston Lawyers' Association Plaintiffs' Complaint") and, therefore, denies the same.

2.2. Defendant Wood specifically denies all other allegations in paragraph 1 of the Houston Lawyers' Association Plaintiffs' Complaint. In particular, she denies that the at large judicial electoral districts scheme as currently constituted denies black citizens an equal opportunity to elect the candidates of their choice in Harris County. She also specifically denies that Art. 5, § 7a(i) of the Texas Constitution was adopted with the intention, or has

been maintained for the purpose of, minimizing the voting strength of black voters.

2.3. Defendant Wood admits that this Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343. However, she denies that the Court has jurisdiction pursuant to 42 U.S.C. § 1973j(f), since that section provides jurisdiction only over causes of action brought under § 1973j to impose civil and criminal penalties on persons who violate various voting rights statutes, and Plaintiffs have not brought any action under § 1973j nor does § 1973j provide for any private cause of action.

2.4. Defendant Wood is without information sufficient to form a belief as to the characterization of the Houston Lawyers' Association in paragraph 4 of Houston Lawyers' Association Plaintiff's Complaint and the race and status of the individual Houston Lawyers' Association Plaintiffs as alleged in paragraph 5 through 10 and therefore denies them.

2.5. Defendant Clements has been dropped from this suit by Court order.

2.6. Defendant Wood is without knowledge or

information sufficient to form a belief as to the truth of the averments in paragraphs 11 through 14 of Houston Lawyers' Association Plaintiffs' Complaint, except to the extent that those averments are admitted by the State Defendants. Defendant Wood denies, however, that the Judicial Districts Board may reapportion the judicial districts of Texas "as the necessity arises in its judgment" without regard to any other factors.

2.7. Defendant Wood makes no averments except with respect to Harris County. Insofar as Harris County is concerned, Defendant Wood is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 15 through 35 of the Complaint to which a responsive pleading may be required and therefore denies them.

2.8. In addition, in response to paragraph 20 of the Complaint, Defendant Wood specifically denies that elections in Harris County in particular are characterized by significant racial bloc voting.

2.9. Defendant Wood also specifically denies that the

State of Texas has used or continues to use unusually large election districts in Harris County; and she denies the implication in paragraph 21 of the Houston Lawyers' Association Plaintiffs' Complaint that the size of the judicial election districts in Harris County is in any way determined or influenced by the number of minority voters in the area.

2.10. Defendant Wood also specifically denies the allegations in paragraph 22 of the Houston Lawyers' Association Plaintiffs' Complaint that the judicial election process is not equally open to blacks, insofar as those allegations refer to Harris County.

2.11. Defendant Wood further specifically denies the allegations in paragraph 35 of the Houston Lawyers' Association Plaintiffs' Complaint that black judicial candidates in Harris County are usually defeated by a bloc voting white majority.

2.12. Defendant Wood denies the allegations incorporated by reference in paragraph 36 of the Houston Lawyers' Association Plaintiffs' Complaint insofar as a responsive pleading is required; and she refers the Houston

Lawyers' Association Plaintiffs to her First Amended Answer to Plaintiffs' First Amended Complaint.

2.13. Defendant Wood admits the allegations in paragraph 37 of the Houston Lawyers' Association Plaintiffs' Complaint that Art. 5, § 7 of the Texas Constitution of 1876 was amended in 1985 to include § 7(a), but she denies that the snippet quoted is meaningful by itself.

2.14. Defendant Wood admits the averments in paragraph 38 insofar as any responsive pleading is required.

2.15. Defendant Wood is without information to permit her to respond to the allegations in paragraphs 39 and 41 and therfore denies them.

2.16. In response to paragraphs 40 and 42 of the Complaint, and with respect to Harris County alone, Defendant Wood specifically denies that the present at large scheme of electing district judges violates the civil rights of the Plaintiffs by diluting their votes. She further denies that the present at large election scheme results in a denial or abridgement of the right of the Plaintiffs to vote on account of their race or color in that they have less opportunity than

other members of the electorate to elect candidates of their choice as alleged in paragraphs 22 and 48 of Houston Lawyers' Association Plaintiffs' Complaint. Intervenor Wood asserts that such condition or effect does not exist in Harris County with respect to the election of district judges. She also asserts that no violation of the Voting Rights Act or of the United States Constitution has occurred within Harris County with respect to the current method or scheme of electing district judges and that, therefore, no remedy is required or justified in order to alleviate a problem which does not exist within this county.

2.17. No responsive pleading is required to the Houston Lawyers' Association Plaintiffs' allegations regarding intervention in paragraphs 43 and 44 of their Complaint.

2.18. Defendant Wood denies the allegations in paragraphs 45 through 48 of the Houston Lawyers' Association Plaintiffs' Complaint. She specifically denies in addition, and with respect to Harris County alone, that the present districting scheme was adopted or has been

maintained with the intention of minimizing the political strength of black voters, as alleged in paragraph 46; and she specifically denies that the present scheme has the result of making the political process in Harris County less open to black voters.

II.

AFFIRMATIVE DEFENSES

A. *Plaintiffs Lack Standing to Bring Their Claims (a) in Twelve of the Fifteen Target Counties and (b) in Each Already Identified Future Minority District in Which No Plaintiff Resides.*

3.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1 through 2.18 as though fully restated.

3.2. Defendant Wood still urging and relying on the matters herein alleged, further alleges by way of affirmative defense that Plaintiffs lack standing to bring their claims of vote dilution in twelve of the fifteen counties which are targets of this suit in that no individual Plaintiff in this suit is a resident of any county except Harris, Midland, and Dallas. Thus, no decision of the Court regarding the

application of Texas' judicial district election scheme in any other county will affect any Plaintiff in this case. When no Plaintiffs will be affected by a decision regarding a claim, the Court lacks jurisdiction over that claim. Hence all claims as to the twelve unrepresented counties should be dismissed and the remaining case severed by county and transferred to the Federal District Court in such county.

3.3. In the alternative, the Court should join as indispensable parties individual voters in each target county as well as the district judges of those counties.

3.4. In addition, with respect to each of the eleven proposed judicial districts Plaintiffs have already identified in which no named Plaintiff is a resident, Plaintiffs lack standing to assert any claims.

B. *State Judicial Elections Are Beyond the Scope of the Voting Rights Act.*

4.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1 through 3.4 as though fully restated.

4.2. Defendant Wood, still urging and relying on the

matters herein alleged, further alleges by way of affirmative defense that state judicial elections are beyond the scope of the Voting Rights Act in that the plain language of § 2 of the Voting Rights Act, as amended in 1982 and codified at 42 U.S.C. § 1973(b), limits the scope of the Act to elections of "representatives," not judges; and she alleges that the Voting Rights Act cannot be properly understood to require that judges, who serve the people rather than represent them, must be elected from single member districts drawn on racial lines, as Plaintiffs would require, in order to correct for the dilution of the votes of protected minority class members in multi-member judicial districts.

C. *The Voting Rights Act, as Amended, is Unconstitutional as Applied to Judicial Elections.*

5.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1 through 4.2 as though fully restated.

5.2. Defendant Wood, still urging and relying on the matters herein alleged, would further alleges by way of affirmative defense that the Voting Rights Act, as amended

in 1982, is unconstitutional as applied to judicial elections.

5.3. Intentional discrimination is an essential element of a violation of the fourteenth and fifteenth amendments to the United States Constitution. The Voting Rights Act derives its constitutional validity from those two amendments and, in particular, from § 5 of the fourteenth amendment and § 2 of the fifteenth amendment, which grant to Congress the power to enforce the provisions of those amendments. Following a holding by the Supreme Court that the Voting Rights Act was violated only by purposeful discrimination, Congress amended § 2 of the Voting Rights Act to make it clear that a violation could be proved by showing discriminatory effect alone without showing a discriminatory purpose on the part of the state in adopting or maintaining a contested electoral mechanism.

5.4. The 1982 amendments to § 2 of the Voting Rights Act transgress the constitutional limitations within which Congress has the authority to interfere with state regulation of the local electoral process. Although Congress has the power under the fourteenth and fifteenth amendments

to pass statutes prohibiting conduct which does not rise to the level of a constitutional violation, it may not infringe any provision of the Constitution in doing so. Yet the Voting Rights Act, at least as applied to judicial elections, violates the principle of separation of powers underlying the United States and the Texas Constitution and the Equal Protection Clause of the fourteenth amendment in order to extend protections to protected minorities which are not themselves required by the Constitution.

5.5. The Equal Protection Clause of the fourteenth amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Voting Rights Act, as amended in 1982, is, however, expressly designed to force states to adopt measures as remedies for alleged vote dilution that favor protected classes over other classes ad thus deprive members of nonprotected classes of the equal protection of the laws. Since Defendant Wood is not a member of a class protected by the Act, that Act, used to force the restructuring of state judicial election districts in

Harris County, Texas, would unconstitutionally deprive Defendant Wood of the equal protection of the laws.

5.6. Section 2 of the Voting Rights Act of 1965, as originally promulgated and enforced prior to 1982, did not expressly favor protected classes. The Act simply forbade any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color. In 1975, the Act was amended to extend its protections to members of language minority groups.[3] In 1982 it was amended once again; and this time its protections were expressly limited to "members of a protected class."[4]

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[3] As amended in 1975, the § 2 of the Voting Rights Act provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [i.e., guarantees protecting language minority groups].

[4] Section 2 of the Voting Rights Act, as amended in 1982, provides:

5.7. Since the protections of § 2 of the Voting Rights Act as amended in 1982 are expressly extended to protected classes and not to others, the Voting Rights Act as amended is a race-based Act designed to further remedial goals. Therefore, its provisions are highly suspect and are to be treated by the courts with strict scrutiny so that they may

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(a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of protected class elected in numbers equal to their proportion in the population.

determine whether its classifications are in fact motivated by racial politics, rather than by a more benign purpose, and whether those classifications carry the danger of leading to a politics of racial hostility.

5.8. Strict scrutiny reveals that the protections of § 2 of the Voting Rights Act, as amended can be invoked in a vote dilution case, such as the present case, only by a protected minority which is geographically insular and politically cohesive and votes as a racial block against a white majority, which also votes as a racial block and usually manages to defeat candidates preferred by the protected minority. In that situation -- and in that situation only -- the Voting Rights Act comes alive to ensure that the protected class will be allowed to elect the representatives of its choice, even if that protected class is in the minority in the challenged election district, and even if the challenge district's boundaries have been drawn for compelling state reasons having nothing to do with race. However, the Voting Rights Act does not protect the rights of any class of people other than those designated by the Act as protected

classes -- even if the unprotected class finds itself in the precise circumstances which would invoke the Act if the class were protected, namely, in a situation where the unprotected class constitutes a minority of voters within a given election district -- a situation which, on information and belief, prevails in much of Southern Texas.

5.9. Defendant Wood makes no allegations concerning the constitutionality of the Voting Rights Act in regard to matters other than judicial elections. However, in regard to judicial elections, Section 2 as amended is a preferential Act which, in the name of preventing discrimination, (a) is actually a device for encouraging and rewarding racial politics and implicitly the notion of race-conscious justice by forcing states to adopt measures to remedy "vote dilution" and (b) by ignoring the principal of "one man-one vote," to guarantee a disproportionally large number of minority judges committed to race-conscious justice. Both concepts would deprive nonprotected classes of the equal protection of the law. That Act therefore fails to meet the test of strict scrutiny and flagrantly violates the equal protection clause of

the Constitution.

5.10. Second, the Voting Rights Act, when extended to judicial elections, obliterates the distinction between legislators -- who represent the people and are properly representatives of the voters' personal interests (such as the voters' desire to have the interests of their racial or language group put foremost) -- and judges -- who serve the interests of all the people impartially and in the proper exercise of whose function the desires of the voters to promote racial identification have no proper role at all. When the Voting Rights Act is applied to judges, the proper distinction between the legislative and judicial function is sacrificed to the promotion of racial interests and any state in which it is so used is denied the opportunity to maintain the separation of the legislative and judicial function which is fundamental to the United States Constitution itself and to all state constitutions, including the Texas Constitution.

WHEREFORE, Harris County District Judge Sharolyn Wood respectfully requests that the Houston Lawyers' Association Plaintiffs' cause of action be dismissed with

respect to the system for electing district judges within Harris County and that judgment be entered in her favor and that she recover all other relief, both general and special, in law and in equity, to which she may show herself justly entitled.

III.

DEFENDANT WOOD'S COUNTERCLAIM

Harris County District Judge Sharolyn Wood, Defendant in the above-captioned action, now acting as and designated Counter-Plaintiff, complains of the Houston Lawyers' Association Plaintiffs, now designated Counter-Defendants, and for cause of action would show by way of counterclaim the following:

6.1. Counter-Plaintiff incorporates by reference the allegations in paragraphs 1.1 through 5.10 as though fully restated.

6.2. In connection with the controversy which is the subject of this cause of action, Counter-Defendants rely integrally on the constitutionality of the Voting Rights Act of 1965 as amended in 1982 and codified at 42 U.S.C.A. §

1973 (West Supp. 1988). Title 28 §§ 2201 and 2202 permit any interested party to seek a declaration of his rights and other legal relations in a case of actual controversy within its jurisdiction and to seek further necessary or proper relief based on a declaratory judgment. Therefore Counter-Plaintiff seeks a declaration of her rights vis-a-vis the amended Voting Rights Act under the United States Constitution.

6.3. For the reasons set forth above in paragraphs 4.1 through 4.2 and hereby incorporated by reference, Counter-Plaintiff alleges that state judicial elections are beyond the scope of the Voting Rights Act of 1965.

6.4. Alternatively, and still urging and relying upon the claim set forth herein, Counter-Plaintiff further alleges that, for the reasons set forth in paragraphs 5.1 through 5.10 and hereby incorporated by reference, the Voting Rights Act as amended in 1982 is uncosntitutional as applied to judicial elections. It deprives non-protected classes of the equal protection of the law, in violation of the fourteenth amendment; and in addition, it deprives citizens of those

states in which it is invoked to force the redistricting of state judicial election districts of their right to a form of government in which the function of the judiciary as servants of the people is kept separate from the function of the legislature as representatives of the people. More specifically, its application in the ways sought by Plaintiffs would deprive Defendant Wood of her constitutional rights.

6.5. In that she seeks a declaration of her constitutional rights, Defendant Wood alleges that she is entitled to court costs and attorney's fees.

WHEREFORE, Counter-Plaintiff Wood respectfully prays that the Court will grant her relief as follows:

1. Declare that the Voting Rights Act of 1965, as amended in 1982, does not apply to judicial elections; or, alternatively,

2. Declare that the Voting Rights Act of 1965, as amended in 1982, is unconstitutional as applied to judicial elections; and

3. Dismiss all of Plaintiffs' claims; and

4. Award Counter-Plaintiff her just costs and

attorney's fees pursuant to 28 U.S.C. § 2202 and 42 U.S.C. § 1988; and

5. Award Counter-Plaintiff such other and further relief in law and in equity to which she may show herself to be justly entitled.

Respectfully submitted,

PORTER & CLEMENTS

By: */s/ J. Eugene Clements*
[Caption]

HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD'S FIRST AMENDED ORIGINAL ANSWER AND COUNTERCLAIM TO PLAINTIFFS LULAC, ET AL.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Sharolyn Wood, Judge of the 127th Judicial District Court of Harris County, Texas ("Wood") and, subject to her Motion to Dismiss and Motion for More Definite Statement, files this her First Amended Original Answer in response to the Plaintiffs' First Amended Complaint in the above-referenced cause of action as follows:

I.

BACKGROUND

1.1. This is a suit originally brought by the League of Latin American Citizens ("LULAC") and certain individual Mexican-American and black citizens of Texas seeking to declare illegal and/or unconstitutional and null and void in certain targeted counties the State of Texas' constitutionally and legislatively mandated system of electing state district judges at large.

1.2. The Texas Constitution Article V, § 7 provides in relevant part that the state shall be divided into judicial districts with each district having one or more judges as provided by law or by the Texas Constitution. The section also provides that each district judge shall be elected by the qualified voters at a general election and shall be a citizen of the state and shall have been a practicing lawyer in the state or a judge of a state court for four years and shall have been a resident of the district for two years and shall agree to reside in the district during his term of office.

1.3. In 1985, the Texas Constitution was amended by the addition of a new section, article V, § 7a, which provides for the reapportionment of Texas judicial election districts. That section provides that no judicial district may be established smaller than an entire county except by majority vote of the voters at a general election. Tex. Const. of 1876, art. V, § 7a(i).

1.4. Pursuant to article V, the Texas legislature has enacted a comprehensive body of statutes governing the formation and function of judicial districts. The policy

underlying the establishment of judicial districts is expressly stated in those statutes, to wit:

> It is the policy of the state that the administration of justice shall be prompt and efficient and that, for this purpose, the judicial districts of the state shall be reapportioned as provided by this subchapter so that the district courts of various judicial districts have judicial burdens that are as nearly equal as possible.

Tex. Gov't Code § 24.945.

1.5. To promote the ends of fairness and efficiency, all the district courts in a county with more than one judicial district are accorded concurrent jurisdiction and courts in those districts are permitted to equalize their dockets. Tex. Gov't Code §§ 24.950, 24.951.

1.6. In addition, the Texas Government Code sets out rules and conditions for the reapportionment of judicial districts.[1] Those statutes expressly require that the

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[1] The Tex. Gov't Code provides,

> (a) The reapportionment of the judicial districts of the state by the board is subject to the rules and conditions provided by Subsection (b)-(d).
>
> (b) Reapportionment of the judicial districts shall be made on a determination of fact by the board that the reapportionment will best promote the efficiency and promptness of the administration of justice in the state by equalizing as nearly as possible the judicial burdens of the district courts of the various judicial districts. In determining the repportionment that best promotes the efficiency and promptness of the administration of justice, the board shall consider:
>
> (1) the numbers and types of cases filed in the district courts of the counties to be affected by the reapportionment;
>
> (2) the numbers and types of cases disposed of by dismissal or judgment in the district courts of those counties;
>
> (3) the numbers and types of cases pending in the district courts of those counties;
>
> (4) the number of district courts in those counties;
>
> (5) the population of the counties;
>
> (6) the area to be covered by a judicial district; and
>
> (7) the actual growth or decline or population and district court case load in the counties to be affected.
>
> (c) Each judicial district affected by a reapportionment must contain one or more complete counties except as provided by this section. More than one judicial district may contain the same county or counties. If more

than one county is contained in a judicial district, the territory of the judicial district must be contiguous.

(d) Subject to the other rules and conditions in this section, a judicial district in a reapportionment under this subchapter may:

(1) be enlarged in territory by including an additional county or counties in the district, but a county having a population as large or larger than the population of the judicial district being reapportioned may not be added to the judicial district;

(2) be decreased in territory by removing a county or counties from the district;

(3) have both a county or counties added to the district and a county or counties removed from it; or

(4) be removed to another location in the state so that the district contains an entirely different county or counties.

(e) The legislature, the Judicial Districts Board, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this subsection. Judicial districts smaller in size than the entire county may be created subsequent to a general election in which a majority of the persons voting on the proposition adopt the proposition "to allow the division of _____ County into judicial districts composed of parts of _____ County." A redistricting plan

reapportionment of state judicial election districts be made on that basis which "will best promote the efficiency and promptness of the administrtation of justice in the state by equalizing as nearly as possible the judicial burdens of the district courts of the various judicial districts." The Code further sets out the factors to be considered in determining which reapportionment best promotes the efficiency and promptness of the administration of justice.

1.7. Not only are both race and racial discrimination entirely alien to Texas' judicial district reapportionment policy and the factors enumerated under it, but both the statement of policy itself and the enumerated factors to be considered make it absolutely clear that the fundamental state policy that determines the apportionment of judicial districts is the vitally important policy of promoting efficiency, promptness, and fundamental fairness in the administration of justice in Texas. Plaintiffs, however, would simply

may not be proposed or adopted by the legislature, the Judicial Districts Board, or the Legislative Redistricting Board in anticipation of a future action by the voters of any county.

disregard this compelling state policy in the interests of increasing the numbers of protected minority class members in the state judiciary. Indeed, Plaintiffs expressly state that "the present electoral scheme is without any legitimate or compelling governmental interest and it arbitrarily and capriciously cancels, dilutes, and minimizes the force and effect of the Plaintiffs' voting strength." Plaintiffs' First Amended Complaint at ¶ 31.

1.8. Despite their claim that the present judicial election scheme is without any legitimate foundation, Plaintiffs state no claim against Texas' judicial election scheme in general. Rather, they complain that Texas' state judicial districts were established and/or are maintained in certain target counties with the intent to discriminate against minorities protected by § 2 of the Voting Rights Act, and that the district judge election scheme in those counties dilutes the votes of blacks and Hispanics and thereby violates the Voting Rights Act, 42 U.S.A. §§ 1971 and 1973, the Civil Rights Act, U.S.C. §§ 1983 and 1988, and the fourteenth and fifteenth amendments to the United States

Constitution. Plaintiffs' Complaint is essentially that when the target counties, which are widely scattered over the State of Texas, are considered as an aggregate, the proportional representation of black and/or Hispanic judges in those counties is less than the proportion of minorities in the gross population of those aggregated counties.

1.9. This suit initially challenged the judicial election system in 47 Texas counties.[2] By agreement between Plaintiffs and the State of Texas, approved by the Court on oral motion of the parties at a hearing on various motions to intervene on February 27, 1989, the number of targeted counties was reduced to 15. These counties are Harris, Dallas, Ector, McLennan, Tarrant, Midland, Travis, Jefferson, Galveston, Lubbock, Fort Bend, Smith, Culberson, El Paso, and Hudspeth.

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[2] The counties targeted initially were Harris, Dallas, Ector, McLennan, Tarrant, Midland, Travis, Jefferson, Galveston, Bell, Lubbock, Fort Bend, Brazos, Brazoria, Taylor, Wichita, Angelina, Gregg, Smith, Atascosa, Frio, Karnes, LaSalle, Wilson, Aransas, Bee, Live Oak, McMullen, San Patricio, Caldwell, Comal, Hays, Calhoun, DeWitt, Goliad, Jackson, Refugio, Victoria, Castro, Hale, Swisher, Culberson, El Paso, and Hudspeth.

II.

DEFENSES

2.1. Defendant Wood acknowledges that the League of United Latin American Citizens ("LULAC") consists of statewide and local organizations composed primarily of United States citizens of Mexican descent as alleged in paragraphs 1, 4 and 5 of Plaintiffs' First Amended Complaint (the "Complaint"). However, she is without knowledge or information sufficient to form a belief as to the truth of the averments in the first paragraph of the Complaint about the citizenship and race of Plaintiffs Christina Moreno, Aquilla Watson, James Fuller, and Judge Matthew W. Plummer, Sr.

2.2. Paragraph 2 of the Complaint contains only averments to which no responsive pleading is required; however, to the extent that it is construed to contain averments requiring a responsive pleading, Defendant denies them.

2.3 To the extent that paragraph 3 of the Complaint is construed to contain averments to which responsive

pleadings are required, Defendant Wood admits the averment in paragraph 3 that the Court has jurisdiction over this action. She is without knowledge or information sufficient to form a belief as to whether each of the cited statutory provisions provides sufficient jurisdiction.

2.4. Defendant Wood is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 4, 5, 6, 7, 8 and 9 of the Complaint. She is without knowledge or information sufficient to form a belief as to the averments in paragraph 10, except to the extent that those averments are admitted by the State Defendants.

2.5. Defendant Wood admits the averments in paragraph 11 and 12 of the Complaint.

2.6. Defendant Wood is without knowledge or information sufficient to form a belief as to the truth of the averments in the remaining paragraphs, 13-32, of the Complaint to which a responsive pleading may be required and therefore denies them.

2.7. In addition, in response to paragraph 26 of the

Complaint, Defendant Wood specifically denies that the at large judicial election system causes an inequality in the opportunity of black or Hispanic voters to elect representatives of their choice, since state district judges are not representatives of the electorate.

2.8. Defendant Wood makes no contention or assertions regarding any other county of the state except Harris County. However, in response to paragraphs 28 and 29 of the Complaint, and with respect to Harris County alone, Defendant Wood specifically denies that the present at large scheme of electing district judges violates the civil rights of the Plaintiffs by diluting their votes. She further denies that the present at large election scheme results in a denial or abridgement of the right of the Plaintiffs to vote on account of their race or color in that they have less opportunity than other members of the electorate to elect candidates of their choice. Defendant Wood asserts that such condition or effect does not exist in Harris County with the respect to the election of district judges. She also asserts that no violation of the Voting Rights Act or of the United

States Constitution has occurred within Harris County with respect to the current method or scheme of electing district judges and that, therefore, no remedy is required or justified in order to alleviate a problem which does not exist within this county.

2.9. Defendant Wood also denies, with respect to paragraph 31 of the Complaint, that Plaintiffs will be irreparably harmed by the continuing violation of their rights in Harris County since she denies that there are any such violations in Harris County. She further denies that the present electoral scheme in Harris County is without any legitimate or compelling government interest.

III.

AFFIRMATIVE DEFENSES

A. *Plaintiffs Lack Standing to Bring Their Claims in Twelve of the Fifteen Target Counties.*

3.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1 through 2.18 as though fully restated.

3.2. Defendant Wood still urging and relying on the

matters herein alleged, further alleges by way of affirmative defense that Plaintiffs lack standing to bring their claims of vote dilution in twelve of the fifteen counties which are targets of this suit in that no individual Plaintiff in this suit is a resident of any county except Harris, Midland, and Dallas. Thus, no decision of the Court regarding the application of Texas' judicial district election scheme in any other county will affect any Plaintiff in this case. When no Plaintiffs will be affected by a decision regarding a claim the Court lacks jurisdiction over that claim. Hence all claims as to the twelve unrepresented counties should be dismissed and the case as to the remaining counties other than Midland should be severed and transferred to such counties.

3.3. In the altnernative, the Court should join as indispensable parties individual voters in each target county as well as the district judges of those counties.

B. *State Judicial Elections Are Beyond the Scope of the Voting Rights Act.*

4.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1

through 3.3 as though fully restated.

4.2. Defendant Wood, still urging and relying on the matters herein alleged, further alleges by way of affirmative defense that state judicial elections are beyond the scope of the Voting Rights Act in that the plain language of § 2 of the Voting Rights Act, as amended in 1982 and codified at 42 U.S.C. § 1973(b), limits the scope of the Act to elections of "representatives," not judges; and she alleges that the Voting Rights Act cannot be properly understood to require that judges, who serve the people rather than represent them, must be elected from single member districts drawn on racial lines, as Plaintiffs would require, in order to correct for the dilution of the votes of protected minority class members in multi-member judicial districts.

C. *The Voting Rights Act, as Amended, is Unconstitutional as Applied to Judicial Elections.*

5.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1 through 4.2 as though fully restated.

5.2. Defendant Wood, still urging and relying on the

matters herein alleged, would further alleges by way of affirmative defense that the Voting Rights Act, as amended in 1982, is unconstitutional as applied to judicial elections.

5.3. Intentional discrimination is an essential element of a violation of the fourteenth and fifteenth amendments to the United States Constitution. The Voting Rights Act derives its constitutional validity from those two amendments and, in particular, from § 5 of the fourteenth amendment and § 2 of the fifteenth amendment, which grant to Congress the power to enforce the provisions of those amendments. Following a holding by the Supreme Court that the Voting Rights Act was violated only by purposeful discrimination, Congress amended § 2 of the Voting Rights Act to make it clear that a violation could be proved by showing discriminatory effect alone without showing a discriminatory purpose on the part of the state in adopting or maintaining a contested electoral mechanism.

5.4. The 1982 amendments to § 2 of the Voting Rights Act transgress the constitutional limitations within which Congress has the authority to interfere with state

regulation of the local electoral process. Although Congress has the power under the fourteenth and fifteenth amendments to pass statutes prohibiting conduct which does not rise to the level of a constitutional violation, it may not infringe any provision of the Constitution in doing so. Yet the Voting Rights Act, at least as applied to judicial elections, violates the principle of separation of powers underlying the United States and the Texas Constitution and the Equal Protection Clause of the fourteenth amendment in order to extend protections to protected minorities which are not themselves required by the Constitution.

5.5. The Equal Protection Clause of the fourteenth amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Voting Rights Act, as amended in 1982, is, however, expressly designed to force states to adopt measures as remedies for alleged vote dilution that favor protected classes over other classes and thus deprive members of nonprotected classes of the equal protection of the laws. Since Defendant Wood is

not a member of a class protected by the Act, that Act, used to force the restructuring of state judicial election districts in Harris County, Texas, would unconstitutionally deprive Defendant Wood of the equal protection of the laws.

5.6. Section 2 of the Voting Rights Act of 1965, as originally promulgated and enforced prior to 1982, did not expressly favor protected classes. The Act simply forbade any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color. In 1975, the Act was amended to extend its protections to members of language minority groups.[3] In 1982 it was amended once again; and this time its protections were expressly limited to "members of a

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[3] As amended in 1975, the § 2 of the Voting Rights Act provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [i.e., guarantees protecting language minority groups].

protected class."[4]

5.7. Since the protections of § 2 of the Voting Rights Act as amended in 1982 are expressly extended to protected classes and not to others, the Voting Rights Act as amended is a race-based Act designed to further remedial goals. Therefore, its provisions are highly suspect and are to be

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[4] Section 2 of the Voting Rights Act, as amended in 1982, provides:

> (a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of protected class elected in numbers equal to their proportion in the population.

treated by the courts with strict scrutiny so that they may determine whether its classifications are in fact motivated by racial politics, rather than by a more benign purpose, and whether those classifications carry the danger of leading to a politics of racial hostility.

5.8. Strict scrutiny reveals that the protections of § 2 of the Voting Rights Act, as amended, can be invoked in a vote dilution case, such as the present case, only by a protected minority which is geographically insular and politically cohesive and votes as a racial block against a white majority, which also votes as a racial block and usually manages to defeat candidates preferred by the protected minority. In that situation -- and in that situation only -- the Voting Rights Act comes alive to ensure that the protected class will be allowed to elect the representatives of its choice, even if that protected class is in the minority in the challenged election district, and even if the challenged district's boundaries have been drawn for compelling state reasons having nothing to do with race. However, the Voting Rights Act does not protect the rights of any class of

people other than those designated by the Act as protected classes -- even if the unprotected class finds itself in the precise circumstances which would invoke the Act if the class were protected, namely, in a situation where the unprotected class constitutes a minority of voters within a given election district -- a situation which, on information and belief, prevails in much of Southern Texas.

5.9. Defendant Wood makes no allegations concerning the constitutionality of the Voting Rights Act in regard to matters other than judicial elections. However, in regard to judicial elections, Section 2 as amended is a preferential Act which, in the name of preventing discrimination, is (a) actually a device for encouraging and rewarding racial politics and implicitly the notion of race-conscious justice by forcing states to adopt measures to remedy "vote dilution" (b) by ignoring the principle of "one-man, one-vote" to guarantee a disproportionately large number of minority judges committed to such race-conscious justice. Both concepts would deprive nonprotected classes of the equal protection of the law. That Act therefore fails to meet the

test of strict scrutiny and flagrantly violates the equal protection clause of the Constitution.

5.10. Second, the Voting Rights Act, when extended to judicial elections, obliterates the distinction between legislators -- who represent the people and are properly representatives of the voters' personal interests (such as the voters' desire to have the interests of their racial or language group put foremost) -- and judges -- who serve the interests of all the people impartially and in the proper exercise of whose function the desires of the voters to promote racial identification have no proper role at all. When the Voting Rights Act is applied to judges, the proper distinction between the legislative and judicial function is sacrificed to the promotion of racial interests and any state in which it is so used is denied the opportunity to maintain the separation of the legislative and judicial function which is fundamental to the United States Constitution itself and to all state constitutions, including the Texas Constitution.

WHEREFORE, Harris County District Judge Sharolyn Wood respectfully requests that the Houston Lawyers'

Association Plaintiffs' cause of action be dismissed with respect to the system for electing district judges within Harris County and that judgment be entered in her favor and that she recover all other relief, both general and special, in law and in equity, to which she may show herself justly entitled.

III.

DEFENDANT WOOD'S COUNTERCLAIM

Harris County District Judge Sharolyn Wood, Defendant in the above-captioned action, now acting as and designated Counter-Plaintiff, complains of the Plaintiffs, now designated Counter-Defendants, and for cause of action would show by way of counter-claim the following:

6.1. Counter-Plaintiff incorporates by reference the allegations in paragraphs 1.1 through 5.10 as though fully restated.

6.2. In connection with the controversy which is the subject of this cause of action, Counter-Defendants rely integrally on the constitutionality of the Voting Rights Act of 1965 as amended in 1982 and codified at 42 U.S.C.A. §

1973 (West Supp. 1988). Title 28 §§ 2201 and 2202 permit any interested party to seek a declaration of his rights and other legal relations in a case of actual controversy within its jurisdiction and to seek further necessary or proper relief based on a declaratory judgment. Therefore Counter-Plaintiff seeks a declaration of her rights vis-a-vis the amended Voting Rights Act under the United States Constitution.

6.3. For the reasons set forth above in paragraphs 4.1 through 4.2 and hereby incorporated by reference, Counter-Plaintiff alleges that state judicial elections are beyond the scope of the Voting Rights Act of 1965.

6.4. Alternatively, and still urging and relying upon the claim set forth herein, Counter-Plaintiff further alleges that, for the reasons set forth in paragraphs 5.1 through 5.10 and hereby incorporated by reference, the Voting Rights Act as amended in 1982 is unconstitutional as applied to judical elections. It deprives non-protected classes of the equal protection of the law, in violation of the fourteenth amendment; and in addition, it deprives citizens of those

states in which it is invoked to force the redistricting of state judicial election districts of their right to a form of government in which the function of the judiciary as servants of the people is kept separate from the function of the legislature as representatives of the people. More specifically, its application in the way by Plaintiff's would deprive Defendant Wood of her constitutional rights.

6.5. In that she seeks a declaration of her constitutional rights, Defendant Wood is entitled to court costs and attorney's fees.

WHEREFORE, Counter-Plaintiff Wood respectfully prays that the Court will grant her relief as follows:

1. Declare that the Voting Rights Act of 1965, as amended in 1982, does not apply to judicial elections; or, alternatively,

2. Declare that the Voting Rights Act of 1965, as amended in 1982, is unconstitutional as applied to judicial elections; and

3. Dismiss all of Plaintiffs' claims; and

4. Award Counter-Plaintiff her just costs and

attorney's fees pursuant to 28 U.S.C. § 2202 and 42 U.S.C. § 1988; and

5. Award Counter-Plaintiff such other and further relief in law and in equity to which she may show herself to be justly entitled.

Respectfully submitted,

PORTER & CLEMENTS

[Caption]

PLAINTIFFS' SECOND AMENDED COMPLAINT

I. INTRODUCTION

1. The members of Plaintiffs LULAC, LULAC COUNCIL #4434 and LULAC COUNCIL #4451 and the named individual Plaintiffs are Mexican-American and Black citizens of the State of Texas. They bring this action pursuant to 42 U.S.C. 1971, 1973, 1983, 1988 to redress a denial, under color of state law, of rights, privileges or immunities secured to Plaintiffs by the said laws and by the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

2. Plaintiffs seek a declaratory judgment that the existing at large scheme of electing district judges in the target areas of the State of Texas violates Plaintiffs' civil rights in that such method illegally and/or unconstitutionally dilutes the voting strength of Mexican-American and Black electors; Plaintiffs seek a permanent injunction prohibiting the calling, holding, supervising or certifying of any future elections for district judges under the present at large scheme

in the target areas; Plaintiffs seek the formation of a judicial districting scheme by which district judges in the target areas are elected from districts which include single member districts; Plaintiffs seek costs and attorneys' fees.

II. JURISDICTION

3. Jurisdiction is based upon 28 U.S.C. 1343 (3) & (4), upon causes of action arising from 42 U.S.C. 1971, 1973, 1983, & 1988, and under the Fourteenth and Fifteenth Amendments to the U.S. Constitution. Declaratory relief is authorized by 28 U.S.C. 2201 & 2202 and by Rule 57, F.R.C.P.

III. PLAINTIFFS

4. Plaintiff LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) is a statewide organization whose members are United States Citizens of Mexican American and black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in the various counties.

5. LULAC Council No. 4434 is a local organization whose membership is composed of United States Citizens

most of whom are of Mexican-American and Black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in Midland County. LULAC Council No. 4451 is a local organization whose membership is composed of United States Citizens most of whom are of Mexican-American or Black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in Ector County.

6. Plaintiff CHRISTINA MORENO is a United States Citizen of Mexican-American descent and is a resident taxpayer of the State of Texas, and is qualified to vote for district judges in Midland County.

7. Plaintiff AQUILLA WATSON is a Black United States Citizen and is a resident taxpayer of the State of Texas, and is qualified to vote for district judges in Midland County.

8. Plaintiff MATTHEW W. PLUMMER, Sr. is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Harris County.

9. Plaintiff JIM CONLEY is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Bexar County.

10. Plaintiff VOLMA OVERTON is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Travis County.

11. Plaintiff WILLARD PEN CONAT is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Fort Bend County.

12. Plaintiff GENE COLINS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Ector County.

13. Plaintiff AL PRICE is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Jefferson County.

14. Plaintiff THEODORE HOGROBROOKS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in

Smith County.

15. Plaintiff ERNEST M. DECKARD is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Smith County.

16. Plaintiff MARY ELLEN HICKS is a Black United States Citizen and is a resident taxpayer of the State of Texas; she is qualified to vote for district judges in Tarrant County.

16a. Plaintiff REV. JAMES THOMAS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Galveston County.

IV. PLAINTIFF INTERVENORS

17. Members of the HOUSTON LAWYERS' ASSOCIATION, ALICE BONNER, WELDON BERRY, FRANCIS WILLIAMS, REV. WILLIAM LAWSON, DELOYD T. PARKER, BENNIE McGINTY, JESSE OLIVER, FRED TINSLEY, JOAN WINN WHITE, and Members of THE BLACK LEGISLATIVE CAUCUS are

Black United States Citizens and are resident taxpayers of the State of Texas; they are qualified to vote for district judges in Texas.

V. DEFENDANTS

18. Defendant JIM MATTOX is the Attorney-General of the State of Texas, and is the chief law enforcement officer of the state and as such, is charged with the responsibility to enforce the laws of the state. Defendant JACK RAINS is the Secretary of State of the State of Texas, and is the chief elections officer of the state and as such, is charged with the responsibility of administering the election laws of the state. Defendants THOMAS R. PHILLIPS, JOHN F. ONION, RON CHAPMAN, THOMAS J. STOVALL, JAMES F. CLAWSON, JR., JOE E KELLY, JOE B. EVINS, SAM M. PAXSON, WELDON KIRK, CHARLES J. MURRAY, RAY D. ANDERSON, LEONARD DAVIS and JOE SPURLOCK, II are members of the JUDICIAL DISTRICTS BOARD created by Art. V. Sec. 7a of the Texas Constitution, and pursuant to Art. 24.941 et. seq. Texas Government Code. They have the

duty to reapportion judicial districts within the State of Texas.

VI. FACTUAL ALLEGATIONS

19. District judges are elected either from judicial districts which are coterminous with and wholly contained within a county, or from judicial districts which are composed of several entire counties.

20. In those counties which contain more than one judicial district, the present election system is an at large scheme with the equivalent of numbered places, the majority rule requirement, and staggered terms.

21. The following counties, which are being challenged in this lawsuit, elect the following number of district judges and, according to the 1980 U.S. Census, contain the following population:

COUNTY	# OF JUDGES ELECTED	TOTAL POP.	S.S. POP. (%)	BLK POP. (%)	CM. %*
Harris	59	2,409,544	369,075(15.3)	473,698(19.7)	35.0
Dallas	36	1,556,549	154,560(9.9)	287,613(18.5)	28.4
Bexar	19	988,800	460,911(46.6)	69,201(7.0)	53.6

Tarrant	23	860,880	67,632(7.9)	101,183(11.8)	19.7
Travis	13	419,335	72,271(17.2)	44,988(10.7)	27.9
Jefferson	8	250,938	10,279(4.1)	70,810(28.2)	32.3
Lubbock	5	211,651	41,428(19.6)	15,780 (7.5)	27.0
Galveston	5	195,940	23,557(12.0)	36,328(18.5)	30.6
McLennan	4	170,755	14,988(8.8)	27,254(16.0)	24.7
Fort Bend	3	130,846	26,656(20.4)	20,420(15.6)	36.0
Smith	4	128,366	4,037(3.1)	28,215(22.0)	25.1
Ector	4	115,374	24,831(21.5)	5,154 (4.5)	26.0
Midland	3	82,636	12,323(14.9)	7,119 (8.6)	23.5
El Paso, Hudspeth, and Culberson**	11	485,942	282,691(58.2)	18,162 (3.7)	61.9

* Combined Minority

** Eight district judges are elected at large within El Paso County; the other three are elected at large within the three county area of El Paso, Hudspeth, and Culberson Counties.

22. The following counties comprise a judicial area that elects three (3) judges at large: EL PASO, CULBERSON, and HUDSPETH. This area contains enough minorities that are sufficiently geographically concentrated that if single member districts were created, at least one of

those districts would be able to elect a minority.

23. The above areas elect 197 district judges. Each area contains enough minorities that are sufficiently geographically concentrated so that if single member districts were created, at least one of those districts in each area would be able to elect a minority.

24. Upon information and belief, in the above named areas minorities are politically cohesive.

25. Upon information and believe in the above cited areas, the white majority votes sufficiently as a block to enable it--in the absence of special circumstances, such as the minority candidate running unopposed--usually to defeat the minority's preferred candidate.

26. Upon information and belief, in the above challenged areas, the at large election scheme interacts with social and historical conditions to cause an inequality in the opportunity of hispanic and/or black voters to elect representatives of their choice as compared to white voters.

27. Upon information and belief, the following are the names of the presently sitting judges' elected from the

above counties:

COURT	JUDGE	COUNTY	VOTING PRECINCT	RACE/ ETHNIC
11th	Mark Davidson	Harris	224	W
55th	Reagan Cartwright	Harris	178	W
61st	Shearn Smith	Harris	**	W
80th	William R. "Bill" Powel	Harris	040	W
113th	Geraldine B. Tennant	Harris	227	W
125th	Don E. Wittig	Harris	118	W
127th	Sharolyn P. Wood	Harris	282	W
129th	Hugo A. Touchy	Harris	385	W
133rd	Lamar McCorkle	Harris	**	W
151st	Alice Oliver Trevathan	Harris	441	W
152nd	Jack O'Neill	Harris	493	W
157th	Felix Salazar, Jr.	Harris	134	H
164th	Pete Solito	Harris	217	W
165th	Ken Harrison	Harris	413	W
174th	George H. Godwin	Harris	015	W
176th	James Brian Rains	Harris	116	W
177th	Miron A. Love	Harris	034	W
178th	William T. "Bill" Harmon	Harris	129	W
179th	J. Mike Wilkinson	Harris	456	W
180th	Patricia R. Lykos	Harris	626	W
182th	Donald K. Shipley	Harris	261	W
183th	Jay W. Burnett	Harris	567	W
184th	Robert N. Burdette	Harris	356	W
185th	Carl Walker, Jr.	Harris	138	B
189th	Richard W. Millard	Harris	056	W
190th	Wyatt H. Heard	Harris	227	W
208th	Thomas H. Routt	Harris	136	B
209th	Michael T. McSpadden	Harris	148	W
215th	Eugene Chambers	Harris	663	W
228th	Ted Poe	Harris	658	W

230th	Joe Kegans	Harris	222	W
232rd	A.D. Azios	Harris	178	H
234th	Ruby K. Sondock	Harris	434	W
245th	Henry G. Schuble	Harris	305	W
246th	John W. Peavy, Jr.	Harris	228	B
247th	Charles Dean Huckabee	Harris	628	W
248th	Woody R. Densen	Harris	034	W
257th	Norman R. Lee	Harris	628	W
262nd	Doug Shaver	Harris	200	W
263rd	Charles J. Hearn	Harris	351	W
269th	W. David West	Harris	219	W
270th	Ann Tyrrell Cochran	Harris	217	W
280th	Melinda Furche Harmon	Harris	129	W
281st	Louis M. Moore	Harris	297	W
295th	Dan Downey	Harris	441	W
308th	Bob W. Robertson	Harris	430	W
309th	John D. Montgomery	Harris	518	W
310th	Allen J. Daggett	Harris	577	W
311th	Bill Elliott	Harris	221	W
312th	Robert S. Webb, III	Harris	200	W
313th	Robert L. Lowery	Harris	371	W
314th	Robert R. Baum	Harris	296	W
315th	Eric G. Andell	Harris	183	W
333rd	Davie L. Wilson	Harris	466	W
334th	Russel T. Lloyd	Harris	316	W
337th	Jim Barr	Harris	432	W
338th	Mary Bacon	Harris	344	W
339th	Norman E. Lanford	Harris	050	W
351st	Lupe Salinas	Harris	115	H
14th	John M. Marshall	Dallas	1174	W
44th	Candace Tyson	Dallas	1203	W
68th	Gary B. Hall	Dallas	1123	W
95th	Joe B. Brown	Dallas	4418	W
101st	Joseph B. Morris	Dallas	1227	W
116th	Frank Andrews	Dallas	1129	W

134th	Anne A. Packer	Dallas	1176	W
160th	Mark Whittington	Dallas	4418	W
162nd	Catherine J. Crier	Dallas	2277	W
191st	David Brooks	Dallas	2242	W
192nd	Merrill L. Hartman	Dallas	2266	W
193rd	Michael J. O'Neill	Dallas	2260	W
194th	Harold Entz, Jr.	Dallas	1185	W
195th	Joe Kendall	Dallas	1171	W
203rd	Thomas B. Thorpe	Dallas	1103	W
204th	Richard D. Mays	Dallas	1148	W
254th	Dee Miller	Dallas	1176	W
255th	Don D. Koons	Dallas	1227	W
256th	Carolyn Wright	Dallas	3302	B
265th	Keith T. Dean	Dallas	1122	W
282nd	Tom Price	Dallas	1202	W
283rd	Jack Hampton	Dallas	2271	W
291st	Gerry Meier	Dallas	1209	W
292nd	Michael E. Keasler	Dallas	4406	W
298th	Adolph Canales	Dallas	1216	H
301st	Robert O'Donnell	Dallas	2203	W
302nd	Frances A. Harris	Dallas	2222	W
303rd	N. Sue Lykes	Dallas	4437	W
304th	Harold C. Gaither, Jr.	Dallas	4516	W
305th	Catherine J. Stayman	Dallas	2253	W
330th	Theo Bedard	Dallas	1185	W
Crim Dist.1	Ron Chapman	Dallas	2241	W
Crim Dist.2	Larry W. Baraka	Dallas	4453	B
Crim Dist.3	Mark Tolle	Dallas	1187	W
Crim Dist.4	Frances J. Maloney	Dallas	1145	W
Crim Dist.5	Pat McDowell	Dallas	1162	W
70th	Gene Ater	Ector	**	W
161st	Tryon D. Lewis	Ector	**	W
244th	Joseph Connally	Ector	**	W

358th	Bill McCoy	Ector	**	W
19th	Bill Logue	McLennan	**	W
54th	George H. Allen	McLennan	**	W
74th	Derwood Johnson	McLennan	**	W
170th	Joe Johnson	McLennan	**	W
17th	Fred W. Davis	Tarrant	2052	W
48th	William L. Hughes, Jr.	Tarrant	2143	W
67th	George Allen Crowley	Tarrant	4095	W
96th	Jeff Walker	Tarrant	3101	W
141st	Dixon W. Holman	Tarrant	2266	W
153rd	Sidney C. Farrar, Jr.	Tarrant	4130	W
213rd	George S. Kredell	Tarrant	2352	W
231st	Maryellen W. Hicks	Tarrant	1104	B
233rd	William H. Brigham	Tarrant	3151	W
236th	Albert L. White,Jr.	Tarrant	1004	W
297th	Everett Young, Jr.	Tarrant	1004	W
322nd	Frank W. Sullivan, III	Tarrant	3151	W
323rd	Scott D. Moore	Tarrant	4343	W
324th	Brian A. Carper	Tarrant	2012	W
325th	Robert L. Wright	Tarrant	1081	W
342nd	Joe Bruce Cunningham	Tarrant	1081	W
348th	Michael D. Schattman	Tarrant	3151	W
352nd	Bruce Auld	Tarrant	3286	W
360th	V. Sue Koenig Stephenson	Tarrant	3289	W
Crim Dist.1	Louis E. Sturns	Tarrant	4203	B
Crim Dist.2	Lee Ann Dauphinot	Tarrant	1189	W
Crim Dist.3	Don Leonard	Tarrant	1004	W
Crim Dist.4	Joe Drago, III.	Tarrant	1022	W

142nd	Pat M. Baskin	Midland	205	W
238th	Van Culp	Midland	307	W
318th	Dean Rucker	Midland	212	W
53rd	Mary Pearl Williams	Travis	237	W
98th	Jeanne Mourer	Travis	207	W
126th	Joe Hart	Travis	320	W
147th	Mace B. Thurman, Jr.	Travis	256	W
167th	Bob Jones	Travis	328	W
200th	Paul R. Davis Jr.	Travis	320	W
201st	Jerry Dellana	Travis	324	W
250th	Harley Clark	Travis	145	W

[Caption]

STATE DEFENDANTS' ORIGINAL ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

The State Defendants -- that is, the Attorney General of Texas, the Secretary of State of Texas and the thirteen members of the Judicial Districts Board of Texas, all in their official capacities -- answer as follows to the Plaintiffs' Second Amended Complaint ("the complaint"):

First Defense

The complaint fails to state a claim against State Defendants upon which relief can be granted because:

A. Each of the judicial districts challenged by the plaintiffs already is a single member district. State district judges are elected to a specific judicial district and serve as the judge for that district without sitting as part of a collegial decisionmaking body. Vote dilution claims cannot be made against a single member electoral system;

B. Alternatively, as to the challenge to the 72nd Judicial District and the 114th Judicial District, only one state district judge is elected from each of the geographical

units comprising them. The 72nd Judicial District is comprised of the counties of Crosby and Lubbock. The 114th Judicial District is comprised of the counties of Smith and Wood. Therefore, each of these two districts is a single member district. Vote dilution claims cannot be made against a single member electoral system;

C. Alternatively, as to the challenge to the following judicial districts, each already is a single member district because it is the only judicial district in the county for which an election is scheduled in the year indicated in brackets adjacent to the district: (i) 238th Judicial District in Midland County [1990]; (ii) 268th Judicial District in Fort Bend County [1992]; (iii) 34th Judicial District in Culberson, El Paso, and Hudspeth Counties (combined) [1992]; (iv) 7th Judicial District in Smith County [1992]; and (v) 161st Judicial District in Ector County [1992]. Vote dilution claims cannot be made against a single member electoral system;

D. Alternatively, as to the challenge to the following judicial districts, each already is a single member district

because it is the only judicial district in the county devoted to the general civil/non-specialized, criminal, or family docket, as indicated in brackets adjacent to the district: (i) 289th Judicial District in Bexar County [family]; (ii) 147th Judicial District in Travis County [criminal]; (iii) 327th Judicial District in El Paso County [family]; (iv) 306th Judicial District in Galveston County [family]; (v) 321st Judicial District in Smith County [family]; (vi) 205th Judicial District in county unit of Culberson, El Paso, and Hudspeth [criminal]; (vii) 328 Judicial District in Fort Bend County [family]; and (viii) 318th Judicial District in Midland County [family]. (It subsequently may be determined that other of the challenged districts also are the only courts of a specialized type within a geographical unit and that, therefore, they too must be added to the immediately foregoing list.) Vote dilution claims cannot be made against a single member electoral system;

E. Alternatively, as to the challenge to the following judicial districts, each already is a single member district because it is the only judicial district in the county devoted

to the general civil/non-specialized, criminal, or family docket, as indicated in brackets adjacent to the district, for which an election is scheduled in the year indicated in braces adjacent to the court specialization designation: (i) 303rd Judicial District in Dallas County [family] {1992}; (ii) 360th Judicial District in Tarrant County [family] {1992}; (iii) 289th Judicial District in Bexar County [family] {1990}; (iv) 147th Judicial District in Travis County [criminal] {1990}; (v) 327th Judicial District in El Paso County [family] {1990}; (vi) 306th Judicial District in Galveston County [family] {1990}; (vii) 321st Judicial District [family] {1990}; (viii) 241st Judicial District in Smith County [general civil/non-specialized] {1990}; (ix) 7th Judicial District in Smith County [general civil/non-specialized] {1992}; (x) 205th Judicial District in county unit of Culberson, El Paso, and Hudspeth [criminal] {1990}; (xi) 210th Judicial District in county unit of Culberson, El Paso, and Hudspeth [general civil/non-specialized] {1990}; (xii) 34th Judicial District in county unit of Culberson, El Paso, and Hudspeth [general civil/non-specialized] {1992}; (xiii) 328th Judicial District in

Fort Bend County [family] {1990}; (xiv) 240th Judicial District in Fort Bend County [general civil/non-specialized] {1990}; (xv) 268th Judicial District in Fort Bend County [general civil/non-specialized] {1992}; (xvi) 318th Judicial District in Midland County [family] {1992}; (xvii) 238th Judicial District in Midland County [general civil/non-specialized] {1990}; and (xviii) 142nd Judicial District in Midland County [general civil/non-specialized] {1992}. (It subsequently may be determined that other of the challenged districts also are the only courts of a specialized type within a geographical unit up for election in a given year and that, therefore, they too must be added to the foregoing list.) Vote dilution claims cannot be made against a single member electoral system.

Second Defense

1. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the first sentence of ¶1 of the complaint. The remainder of ¶1 of the complaint contains only averments to which no responsive pleading is required; however, to the

extent it is construed to contain averments requiring a responsive pleading, the State Defendants deny them.

2. ¶2 of the complaint contains only averments to which no responsive pleading is required; however, to the extent it is construed to contain averments requiring a responsive pleading, the State Defendants deny them.

3. To the extent that ¶3 of the complaint is construed to contain averments to which a responsive pleading is required, the State Defendants admit ¶3's averment that the Court has jurisdiction over this action, but deny that each of the cited provisions provides such jurisdiction.

4. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶¶4-17 of the complaint.

5. The State Defendants admit that the averments in the first two sentences of ¶18 accurately identify who hold the two official positions to which reference is made and are generally accurate in their description of the state law-based responsibilities concerning the administration and

enforcement of the laws of the state of Texas, including those concerning the electoral process. Because of uncertainty about the intended reach of some of the descriptions of the officials' duties in the first two sentences of ¶18, however, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of those averments beyond what is stated in the preceding portion of this paragraph. The State Defendants admit the averments in the third sentence of ¶18, except they deny that John F. Onion and Charles J. Murray are members of the Judicial Districts Board of Texas. They have been replaced by Michael J. McCormick and Roger J. Walker, respectively. The State Defendants deny the averments in the fourth sentence of ¶18 because the reapportionment duties are not exclusive and are dependent on other circumstances.

6. The State Defendants admit the averments in ¶19 of the complaint.

7. The State Defendants deny the averments in ¶20 of the complaint.

8. The State Defendants deny the averments in ¶21 of the complaint insofar as they state or imply that: counties are being challenged; they have listed all the counties within whose geographical boundaries lie challenged judicial districts; and the listing of the number of state district judges elected within a specific county's geographical boundaries indicates the number of at-large positions held by state district judges within that county's boundaries. At this point, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining averments in the paragraph, including averments concerning population data indicated by the 1980 United States Census. The 1980 United States Census data speaks for itself.

9. The State Defendants deny the averments in ¶¶22 and 23 of the complaint.

10. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶¶24-26 of the complaint.

11. The State Defendants admit, except for certain spelling or typographical errors, the averments in ¶27 of the

complaint concerning the listing of the challenged district courts and the names of the individuals currently holding those positions. The State Defendants admit the paragraph's averments about the geographical unit in which voters may cast their votes for those judicial district positions, except for the averments about the 72nd and 114th Judicial Districts. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶27 of the complaint about the voting precinct and the race or ethnicity of the individuals currently holding the district judgeships. However, attached as Exhibit A to this answer is a chart which assumes the accuracy of the plaintiffs' racial/ethnic classification of individuals currently holding office in the challenged judicial districts. Exhibit A uses this assumption, plus the specialization designations for the judicial districts in the Texas Government Code, plus the schedule of when those positions are up again for election as indicated in the 1988 Fiscal Year Report on the Texas Judicial System as prepared by the Texas Judicial Council/Office of Court Administration.

12. The State Defendants deny the averments in ¶¶28 and 29 of the complaint.

13. ¶30 of the complaint contains only legal averments to which no responsive pleading is required.

14. The State Defendants deny the averments in ¶¶31 and 32 of the complaint.

15. ¶33 of the complaint contains only legal averments to which no responsive pleading is required.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

[Caption]

DALLAS COUNTY DISTRICT JUDGE F. HAROLD ENTZ'S FIRST AMENDED ANSWER TO LULAC'S SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE BUNTON:

The Honorable F. Harold Entz ("Judge Entz") files his First Amended Answer to LULAC's Second Amended Complaint as follows:

RESPONSE TO NUMBERED PARAGRAPHS

1. Judge Entz lacks knowledge and information sufficient to form a belief regarding the specific membership of LULAC, the various LULAC councils, and the named individual plaintiffs, but has no reason to doubt that they are Mexican-American and African-American citizens of the State of Texas. Judge Entz need not respond to the legal statement with respect to the purported statutory bases for the instant action, but specifically denies that any of the Dallas County Plaintiffs have been denied any of their rights, privileges, or immunities secured by the laws of the United States of America.

2. Judge Entz denies that the Dallas County

Plaintiffs are entitled to any of the relief sought.

3. Judge Entz does not contest jurisdiction at this time, but denies that any cause of action exists with respect to Dallas County.

4.-17. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of these allegations.

18. Judge Entz admits that the persons named hold the identified offices. The balance of the paragraph alleges a legal conclusion that Judge Entz neither admits nor denies.

19. Admitted as to Dallas County.

20. Denied because of the ambiguous terms used. Dallas County Judicial Districts are coterminous with county lines and Judges are elected by majority vote in differing years.

21.-22. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of these allegations.

23. Judge Entz denies that Mexican-Americans are sufficiently geographically compact in Dallas County to constitute a safe majority in any single member district if a single member districting plan was employed in Dallas

County. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in the paragraph.

24.-26. Denied with respect to Dallas County.

27. Admitted with respect to Dallas County.

28.-29. Denied with respect to Dallas County.

30. This paragraph alleges a legal conclusion that Judge Entz neither admits nor denies.

31.-32. Denied with respect to Dallas County.

33. Judge Entz denies that Plaintiffs are entitled to the relief sought with respect to Dallas County.

AFFIRMATIVE DEFENSES

34. For purposes of preserving appellate review, Judge Entz affirmatively claims that neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution apply to judicial selection.

35. The lack of electoral success, if any, of minority candidates for judicial office was not caused by the electoral practices that Plaintiffs challenge. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States

Constitution apply to electoral practices that do not cause the lack of electoral success, if any, of minority candidates.

36. Electoral success of judicial candidates in Dallas County depends on the partisan affiliation of the candidate, rather than the race of the candidate. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution ensure the right of minority voters to elect judicial candidates from the political party of their choice.

37. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution permit aggregating distinct minority groups to prove dilution.

38. Application of either the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to judicial elections is unconstitutional because it violates the separation of powers doctrine, the 10th amendment of the United States Constitution, and fundamental principles of federalism.

39. Application of either the Voting Rights Act or the 14th and 15th amendments of the United States

Constitution to alter electoral practices that did not cause the lack of electoral success, if any, of minority judicial candidates or the underrepresentation, if any, of minorities among successful judicial candidates would be unconstitutional under the equal protection and due process clauses of the United States Constitution.

40. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to require single member districts for judicial elections in Dallas County without adjusting Texas state law venue and jury selection provisions to provide coterminous districts for venue and jury selection purposes would violate the due process and equal protection clauses and the 6th and 7th amendments of the United States Constitution.

41. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to adjust Texas state law venue and jury selection provisions would violate the Guaranty Clause and 10th amendment of the United States Constitution, as well as fundamental principles of federalism.

42. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to Dallas County to require single member judicial districts, based on a showing that minorities are unable to elect non-minority candidates of the political party of the minorities preference, would unconstitutionally interfere in the political process by favoring the political party currently enjoying the support of the minority population, as opposed to removing any alleged remaining obstacles to the elections of minority candidates.

43. Minorities are overrepresented on the Dallas County State District Courts in proportion to the number of minorities in Dallas County eligible for such judicial offices.

44. Plaintiffs' claims should be dismissed for failure to join all district judges within the "target counties" and all appellate judges as defendants in that these judges are necessary or indispensable parties under Rule 19.

WHEREFORE, Dallas County District Judge F. Harold Entz respectfully requests that the Plaintiffs' claims be dismissed with respect to the system for electing district

judges within Dallas County and that judgment be entered in his favor and that he recover all other relief to which he may show himself justly entitled.

Respectfully submitted,

[Caption]

DALLAS COUNTY DISTRICT JUDGE F. HAROLD ENTZ'S ANSWER TO PLAINTIFF INTERVENORS OLIVER, WHITE, AND TINSLEY

TO THE HONORABLE JUDGE BUNTON:

The Honorable F. Harold Entz ("Judge Entz"), to the extent that Plaintiff Intervenors Oliver, White, and Tinsley have not abandoned their Complaint in Intervention by joining in LULAC's Second Amended Complaint, responds as follows:

RESPONSE TO NUMBERED PARAGRAPHS

1. Judge Entz admits that Jesse Oliver, Fred Tinsley, and Joan Winn White ("Intervenors") are former state district judges of Dallas County. He need not respond to the legal statement with respect to the purported statutory bases for the instant action, but specifically denies that Intervenors or any of the Dallas County Plaintiffs have been denied any of their rights, privileges, or immunities secured by the laws of the United States of America.

2. Judge Entz denies that Intervenors or any of the Dallas County Plaintiffs are entitled to any of the relief

sought with respect to Dallas County.

3. Judge Entz does not contest jurisdiction at this time, but denies that any cause of action exists with respect to Dallas County.

4. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of these allegations.

5. Judge Entz admits that the persons named hold the identified offices. The balance of the paragraph alleges a legal conclusion that Judge Entz neither admits nor denies.

6. Admitted as to Dallas County.

7. Denied because of the ambiguous terms used. Dallas County Judicial Districts are coterminous with county lines and Judges are elected by majority vote in differing years.

8.-17. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of these allegations, except that Judge Entz admits that Dallas County contains multiple judicial districts and denies that the Hispanic population in Dallas County is sufficiently compact to form a majority in any single member district that could be drawn.

18. Judge Entz denies that Mexican-Americans are sufficiently geographically compact in Dallas County to constitute a safe majority in any single member district if a single member districting plan was employed in Dallas County. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in the paragraph.

19.-21. Denied with respect to Dallas County.

22. This paragraph calls for no responsive pleading.

23.-24. Denied with respect to Dallas County.

25. This paragraph alleges a legal conclusion that Judge Entz neither admits nor denies.

26.-27. Denied with respect to Dallas County.

28. Judge Entz denies that Intervenors or any of the Dallas County Plaintiffs are entitled to the relief sought with respect to Dallas County.

AFFIRMATIVE DEFENSES

29. For purposes of preserving appellate review, Judge Entz affirmatively claims that neither the Voting Rights Act nor the 14th and 15th amendments of the United

States Constitution apply to judicial selection.

30. The lack of electoral success, if any, of minority candidates for judicial office was not caused by the electoral practices that Plaintiffs challenge. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution apply to electoral practices that do not cause the lack of electoral success, if any, of minority candidates.

31. Electoral success of judicial candidates in Dallas County depends on the partisan affiliation of the candidate, rather than the race of the candidate. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution ensure the right of minority voters to elect judicial candidates from the political party of their choice.

32. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution permit aggregating distinct minority groups to prove dilution.

33. Application of either the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to judicial elections is unconstitutional because

it violates the separation of powers doctrine, the 10th amendment of the United States Constitution, and fundamental principles of federalism.

34. Application of either the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to alter electoral practices that did not cause the lack of electoral success, if any, of minority judicial candidates or the underrepresentation, if any, of minorities among successful judicial candidates would be unconstitutional under the equal protection and due process clauses of the United States Constitution.

35. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to require single member districts for judicial elections in Dallas County without adjusting Texas state law venue and jury selection provisions to provide coterminous districts for venue and jury selection purposes would violate the due process and equal protection clauses and the 6th and 7th amendments of the United States Constitution.

36. Application of the Voting Rights Act or the 14th

and 15th amendments of the United States Constitution to adjust Texas state law venue and jury seiection provisions would violate the Guaranty Clause and 10th amendment of the United States Constitution, as well as fundamental principles of federalism.

37. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to Dallas County to require single member judicial districts, based on a showing that minorities are unable to elect non-minority candidates of the political party of the minorities preference, would unconstitutionally interfere in the political process by favoring the political party currently enjoying the support of the minority poplulation, as opposed to removing any alleged remaining obstacles to the elections of minority candidates.

38. Minorities are overrepresented on the Dallas County State District Courts in proportion to the number of minorities in Dallas County eligible for such judicial offices.

39. Plaintiffs' claims should be dismissed for failure to join all district judges within the "target counties" and all

appellate judges as defendants in that these judges are necessary or indispensable parties under Rule 19.

WHEREFORE, Dallas County District Judge F. Harold Entz respectfully requests that Intervenors and the Dallas County Plaintiffs' claims be dismissed with respect to the system for electing district judges within Dallas County and that judgment be entered in his favor and that he recover all other relief to which he may show himself justly entitled.

Respectfully submitted,

[Caption]

STATE DEFENDANTS' ANSWER TO COMPLAINT IN INTERVENTION BY HOUSTON LAWYERS' ASSOCIATION, ET AL.

The State Defendants -- that is, the Attorney General of Texas, the Secretary of State of Texas, and the thirteen members of the Judicial Districts Board of Texas, all in their official capacities -- answer as follows to the Complaint in Intervention ("complaint") of the Houston Lawyers' Association, Alice Bonner, Weldon, Berry, Francis Williams, Rev. William Lawson, Deloyd T. Parker, and Bennie McGinty.

First Defense

The complaint fails to state a claim against State Defendants upon which relief can be granted because each of the judicial districts challenged in Harris County already is a single member district. Sate district judges are elected to a specific judicial district and serve as the judge for that district without sitting as part of a collegial decisionmaking body. Vote dilution claims cannot be made against a single member electoral system.

Second Defense

1. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the first sentence of ¶1 of the complaint. The remainder of ¶1 of the complaint contains only averments to which no responsive pleading is required; however, to the extent it is construed to contain averments requiring a responsive pleading, the State Defendants deny them.

2. ¶¶2 and 3 of the complaint contain only averments to which no responsive pleading is required; however, to the extent they are construed to contain averments requiring a responsive pleading, the State Defendants deny them.

3. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of averments in ¶¶ 4-10 of the complaint.

4. The State Defendants admit that the averments in ¶¶11--13 of the complaint accurately identify the holders of the official positions to which reference is made and are generally accurate in their descriptions of the state law-based

responsibilities concerning the administration and enforcement of the laws of the state of Texas, including those concerning the electoral process. Because of uncertainty about the intended reach of some of the descriptions of the officials' duties in ¶¶11-13, however, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of those averments beyond what is stated in the preceding portion of this paragraph.

5. The State Defendants deny the averments in the first three sentences of ¶14 of the complaint and admit the averments in the fourth sentence of that paragraph. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the last sentence of ¶14 of the complaint.

6. The State Defendants deny the averments in ¶15 of the complaint, among other things, because of uncertainty as to the full meaning of "history."

7. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the

averments in ¶16-18 of the complaint.

8. The State Defendants admit the averments in ¶19 of the complaint.

9. The State Defendants deny the averments in ¶¶20-22 of the complaint.

10. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶¶23-24 of the complaint.

11. The State Defendants deny the averments in ¶25 of the complaint.

12. Except for the averments in the second sentence of ¶27, which they admit, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶¶26-29 of the complaint.

13. The State Defendants admit the averments in the first sentence of ¶30 of the complaint and deny the averments in the remainder of that paragraph.

14. The State Defendants deny the averments in ¶¶31-32 of the complaint, in part because of uncertainty as to the intended reach of some of the allegations.

15. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶33 of the complaint.

16. The State Defendants deny the averments in ¶¶34-35 of the complaint.

17. The State Defendants incorporate by reference their Answer to the paragraphs 11-29 of Plaintiffs' First Amended Complaint as their response to ¶36 of the complaint.

18. The State Defendants admit the averments in ¶37 of the complaint.

19. The State Defendants admit that the averments in ¶38 of the complaint are generally correct, but note that the first sentence of the current version of the referenced constitutional provision states that the "State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution."

20. The State Defendants deny the averments in ¶¶39-40 of the complaint.

21. The State Defendants are without knowledge or

information sufficient to form a belief as to the truth of the averments in ¶41 of the complaint.

22. The State Defendants deny the averments in ¶42 of the complaint.

23. The State Defendants admit the averments in ¶43 of the complaint.

24. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶44 of the complaint.

25. The State Defendants deny the averments in ¶¶45-48 of the complaint.

26. The remainder of the complaint contains only legal averments to which no responsive pleading is required.

TRIAL EXHIBIT NO. 1 OF JUDGE SHAROLYN WOOD

TRIAL EXHIBIT NO. 1 OF JUDGE SHAROLYN WOOD

HARRIS COUNTY MINORITY CANDIDATE
CONTESTED JUDICIAL RACES:

GENERAL ELECTIONS

Court		Candidates		Vote	GOP %
		1980			
Court of Civil Appeals	(W)	(R)*	Conway	298,274	50.9
	(B)	(D)	Doyle	288,197	
80th District Court	(W)	(R)	McAfee	306,767	51.4
	(B)	(D)*	Bonner	290,458	
309th District Court	(W)	(R)	Zimmerman	309,816	51.6
	(H)	(D)*	Hinojosa	290,870	
County Criminal Court	(W)	(R)	Musselwhite	307,931	53.3
	(B)	(D)*	Muldrow	269,420	

* = Incumbent
Winner is underlined

42 Races

26 White Winners
11 Hispanic Winners
5 Black Winners

133a

Court		Candidates		Vote	GOP %
		1982			
157th District Court	(W)	(R)	Powell	185,030	46.0
	(H)	(D)*	Salazar	217,234	
208th District Court	(W)	(R)	Arnold	191,659	48.7
	(B)	(D)*	Routt	201,838	
262nd District Court	(W)	(R)	Shaver	199,671	51.1
	(B)	(D)*	James	190,716	
281st District Court	(H)	(R)	Moore	201,623	51.9
	(B)	(D)*	Ward	187,093	
308th District Court	(H)	(R)	Leal	190,985	48.7
		(D)	Robertston	201,465	
County Criminal Court 6	(W)	(R)	Musselwhite	198,221	50.9
	(B)	(D)*	Muldrow	191,136	
County Criminal Court 9	(W)	(R)	Kolenda	172,467	44.8
	(H)	(D)*	Leal	212,091	

134a

Court		Candidates		Vote	GOP %
		- 1980 -			
Court of Appeals No. 1, Place 2	(W)	(D)	O'Connor	365,280	
	(B)	(R)*	Hoyt	414,462	53.2
80th District Court	(B)	(D)*	Berry	347,336	
	(W)	(R)	Powell	416,438	54.5
178th District Corut	(B)	(D)*	Jackson	324,025	
	(W)	(R)	Harmon	429,858	57.0
215th District Court	(B)	(D)*	Lee	363,686	
	(W)	(R)	Chambers	401,026	52.4
339th District Court	(H)	(D)*	Salinas	359,482	
	(W)	(R)	Lanford	400,734	52.7
- 1986 -					
Texas Supreme Court, Place 4	(H)	(D)*	Gonzales	241,196	
	(W)	(R)	Bates	208,211	46.3
157th Civil District Court	(H)	(D)*	Salazar	243,146	
	(W)	(R)	Wittig	200,169	45.2

135a

Court		Candidates		Vote	GOP %
180th Criminal District Court	(H)	(D)*	Guerrero	211,905	
	(W)	(R)	Lykos	230,825	52.1
185th Criminal District Court	(B)	(D)*	Walker	218,637	
	(W)	(R)	Godwin	209,663	49.0
209th Criminal District Court	(H)	(D)*	Sanchez	192,359	
	(W)	(R)	McSpadden	250,808	56.6
232nd Criminal District Court	(H)	(D)*	Azios	234,271	
	(W)	(R)	Youngblood	203,799	46.5
245th Civil District Court	(W)	(D)	Schuble	241,414	
	(B)	(R)*	Proctor	191,477	44.2
281st Civil District Court	(B)	(D)*	Berry	202,886	
	(H)	(R)	Moore	229,288	53.1
308th Family District Court	(W)	(D)	Robertson	236,044	
	(H)	(R)*	Dodier	183,755	43.8
County Civil Court 3	(B)	(D)*	Hobson	217,363	
	(W)	(R)	Hughes	211,650	49.3
County Criminal Court 3	(W)	(D)	Duncan	238,376	
	(B)	(R)*	Irvin	199,867	45.6

136a

Court		Candidates		Vote	GOP %
County Criminal Court 9	(H)	(D)*	Leal	226,455	
	(W)	(R)	Powell	199,667	46.9
County Criminal Court 11	(H)	(D)*	Mendoza	221,631	
	(W)	(R)	Pickren	206,094	48.2
County Criminal Court 13	(B)	(D)*	Fitch	211,713	
	(W)	(R)	Atkinson	213,268	50.2
County Criminal Court 14	(B)	(D)*	Fisher	201,922	
	(W)	(R)	Barclay	216,467	51.7
County Probate Court 4	(B)	(D)*	Lee	212,710	
	(W)	(R)	McCullough	223,894	51.3
- - - - - - - - - - - - - - - - - - - -		1988		- - - - - - - - - - - - - - - - - - - -	
Supreme Court, Place 3	(H)	(D)*	Gonzales	407,451	55.9
	(W)	(R)	Howell	309,486	43.38
	(W)	(L)	Scholz	13,262	1.81
1st Court of Appeals District, Place 6	(H)	(D)*	Mirabal	385,692	54.09
	(W)	(R)	Stephanow	327,365	45.91

Court		Candidates		Vote	GOP %
80th District Court	(B)	(D)*	Berry	307,612	43.32
	(W)	(R)	Powell	402,426	56.68
133rd District Court	(B)	(D)*	Plummer	313,880	44.67
	(W)	(R)	McCorkle	388,804	55.33
152nd District Court	(B)	(D)	Fitch	329,325	46.53
	(W)	(R)*	O'Neill	378,353	53.47
179th District Court	(H)	(D)	Guerrero	347,287	49.36
	(W)	(R)	Wilkinson	356,335	50.64
215th District Court	(B)	(D)	Jackson	307,147	44.04
	(W)	(R)	Chambers	390,290	55.96
295th District Court	(B)	(D)	Lee	344,835	48.5
	(W)	(R)*	Downey	366,130	51.5
333rd District Court	(B)	(D)	Spencer	335,960	47.73
	(W)	(R)	Wilson	367,927	52.27
351st District Court	(H)	(D)	Salinas	363,444	51.76
	(W)	(R)	Pruett	338,769	48.25

TRIAL EXHIBIT NO. 2 OF JUDGE SHAROLYN WOOD

HARRIS COUNTY MINORITY CANDIDATE JUDICIAL RACES:

DEMOCRATIC PRIMARY ELECTIONS

Position	Name	Vote	%
	- 1982 -		
157th Judicial District	(H) Salazar	40,821	100
208th Judicial District	(B) Routt	40,854	100
246th Judicial District	(B) Peavy	42,881	100
County Criminal Court #2	(W) Hendrix	27,426	52.97
	(H) Barrera	24,346	47.03
County Criminal Court #6	(B) Muldrow	36,976	100

Winner is underlined

39 Races:

20 Black Winners
13 Hispanic Winners
6 White Winners

Position		Name	Vote	%
		1984		
Court of Appeals, District 1 Place 2	(B)	Mims	18,373	18.92
	(W)	Briscoe	36,363	37.73
	(W)	Price	19,513	20.10
	(W)	O'Conner	22,573	23.25
80th Judicial District	(B)	Berry	71,624	100
178th Judicial District	(W)	Dietz	5,236	5.91
	(H)	Castillo	28,018	31.62
	(W)	O'Brien	17,374	19.61
	(W)	Parrott	10,326	11.65
	(W)	Stripling	4,222	4.77
	(B)	Jackson	23,448	26.46
215th Judicial District	(W)	Brannon	15,282	15.93
	(B)	Lee	57,278	59.68
	(W)	Price	23,413	24.39
333rd Judicial District	(W)	Gilbert	21,293	24.92
	(W)	Levi	14,462	16.93
	(W)	Walters	26,938	31.53
	(H)	Sanchez	22,749	26.62

Position		Name	Vote	%
339th Judicial District	(B)	White	30,673	34.82
	(H)	Salinas	43,251	48.96
	(B)	James	14,414	16.32
351st Judicial District	(W)	Burnett	51,143	64.83
	(B)	Muldrow	27,748	35.17
County Civil Court at Law No. 3 (Unexpired)	(H)	Chow	25,377	29.02
	(B)	Hobson	32,868	37.58
	(W)	Drake	21,946	25.10
		Amaimo	7,261	8.30
		1986		
Supreme Court, Place 4 (Unexpired)	(H)	Gonzalez	29,334	57.27
	(W)	Humphreys	8,196	16.00
	(W)	Gibson	9,791	19.11
	(W)	Ivy	3,902	7.62
157th Judicial District	(H)	Salazar	40,568	100

Position		Name	Vote	%
180th Judicial District	(H)	Guerrero	20,765	43.79
	(W)	Kobobel	8,725	18.40
	(W)	Lanier	17,927	37.81
185th Judicial District	(B)	Walker	29,011	49.61
	(H)	Salinas	23,412	40.04
	(W)	Peterson	6,052	10.35
208th Judicial District	(B)	Routt	39,116	100
209th Judicial District	(H)	Sanchez	38,209	100
232nd Judicial District	(H)	Azios	39,995	100
246th Judicial District	(B)	Peavy	42,097	100
281st Judicial District	(B)	Berry	39,416	100
295th Judicial District	(B)	Jackson	24,650	48.15
	(W)	White	26,539	51.85
County Court at Law No. 3	(B)	Hobson	36,246	100
County Criminal Court No. 4	(B)	Williams	39,730	100
County Criminal Court No. 9	(H)	Leal	37,508	100

Position		Name	Vote	%
County Criminal Court No. 11	(W)	Craggs	9,073	18.97
	(H)	Mendoza	17,062	35.67
	(W)	Bynum	5,342	11.17
	(W)	Reynolds	9,109	19.05
	(W)	Bostick	7,241	15.14
County Criminal Court No. 13	(B)	Fitch	37,300	100
County Criminal Court No. 14	(B)	Fisher	25,125	50.86
	(H)	Fraga	24,280	49.14
County Probate Court No. 4	(W)	Smith	19,478	34.68
	(B)	Lee	36,689	65.32
- - -

Position	Name	Vote	%
133rd Judicial District	(B) Plummer	91,505	100
152nd Judicial District	(B) Fitch	88,890	100
179th Judicial District	(H) Guerrero	55,616	48.09
	(W) Robertson	45,825	39.62
	(W) Tise	14,212	12.29
215th Judicial District	(B) Jackson	61,586	62.60
	(W) Smith	36,803	37.41
333rd Judicial District	(B) Spencer	63,676	59.55
	(W) Wooten	43,248	40.45
351st Judicial District	(H) Salinas	87,874	100

[Caption]

MOTION OF JUDGES TOM RICKHOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE, AND MICHAEL P. PEDEN TO INTERVENE AS DEFENDANTS

TO THE HONORABLE JUDGE OF SAID COURT:

Judges Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon MacRae, and Michael P. Peden move for permission to intervene in this action as party defendants pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure and attach as Exhibit A to this Motion their original Intervention (as Defendants) for the following reasons:

INTERVENTION OF RIGHT PURSUANT TO RULE 24(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

1. Rule 24(a)(2) allows intervention as of right by intervenors who: (1) are timely; (2) have an interest relating to the subject of the action; (3) are so situated that the disposition of the action may, as a practical matter, impair or impede their ability to protect that interest; and (4) are inadequately represented by existing parties. Rule 24(b) grants the court discretion to allow intervention by

intervenors whose claims or defenses have a question of law of fact in common with the main action and whose intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

2. Judges Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon MacRae, and Michael P. Peden (the "Bexar County District Judge Intervenors") are presently State Court District Judges (in the 289th, 144th, 225th, 226th, 290th, and 285th District Courts) in Bexar County, Texas. Bexar County is one of the counties in Texas made the subject of the claims by Plaintiff and Plaintiff-Intervenors in this action. All of the Bexar County Judge Intervenors are incumbents, and all have filed for re-election or announced their intent to file for re-election in the upcoming judicial elections.

3. The Bexar County District Judge Intervenors have interests relating to the transaction which is the subject of this action, the Court's Memorandum and Order of November 8, 1989, as they affect Bexar County and in the joint proposed interim plan between the Attorney General of

the State of Texas and the Plaintiffs. Other judges from Dallas and Harris County, Texas, already have intervened in this action as Defendants, and the Court already has recognized the propriety of such intervention of those judges.

4. The Bexar County District Judge Intervenors are situated so that the Court's disposition of this action will impair and impede substantially their ability to protect their interests, and the interests of the Bexar County District Judge Intervenors certainly are not represented adequately by any existing party in this action. In fact, the Attorney General of Texas, counsel for the State Defendants, has joined with Plaintiffs in submitting to the Court a joint Proposed Interim Plan that is contrary to these Intervenor's interests.

5. These Intervenor's are also similarly situated with and form part of the nexus between the remainder of the Bexar County District Judges, and the other district judges of the Fourth Judicial Administrative District, who will be impacted by the scope of any proposed interim plan or judgment so that the entire group of judges affected by any proposed interim plan and judgment will be similarly

and simultaneously affected.

6. These Intervenor's, as well as the other judges mentioned in paragraph 4 above, are uniquely situated as a group to decide proper court administration and determine the rights of litigants.

7. The joint proposed plan is entirely inconsistent with and prejudicial to the interests of the Bexar County Judge Intervenors, are contrary to the express wishes and specific instructions of the Attorney General's clients and contrary to the Texas Constitution. The Attorney General's unauthorized impermissible actions have been widely criticized by his clients, including the Governor of the State of Texas, the Chief Justice of the Supreme Court of Texas, and Associate Justice of the Supreme Court of Texas, and numerous State District judges who are directly affected. An obvious conflict of interest exists and the court should not approve the proposed interim plan of the Attorney General under such circumstances.

8. This case has great and serious implications for all Texans and the entire judicial system in Texas, will

require submission to the voters of amendments to the Texas Constitution, will require the Texas Legislature to act, and should not proceed in any manner until Defendants can secure counsel who will in fact represent Defendants fully and properly.

9. This Honorable Court on November 8, 1989, after extensive consideration, entered its Memorandum Opinion and Order (the "Order") in which the Court made certain explicit comments that are pertinent here. The Court expressed the following comments:

a. Legislation should be done by legislators (Order, p. 4);

b. The Texas Constitution will need to be amended (Order, p. 4); and

c. Single member districts may or may not be the answer if we are to continue to have partisan elections (Order, p. 6).

Should the Legislature fail to adopt a satisfactory remedy in the Special Session . . . this Court will consider the granting of an expedited appeal to the Fifth Circuit to

determine whether or not the Declaratory Judgment of this Court [the "Order"] was properly made. (Order, p. 94).

10. In this proceeding, the Intervenors have been represented by the Attorney General of the State of Texas, who, following the Court's Order of November 8, 1989, has decided, without proper authority, to submit an interim plan to this Court to govern judicial elections of Intervenors, and others similarly situated, for the 1990 election.

11. In so proposing, the Attorney General's proposed plan violates the Texas Constitution, Article 5, § 7 (Vernon Supp. 1989) which allows Intervenors to serve a term of four (4) years because the proposed plan allows Intervenors to serve only two (2) years if elected in 1990. This Court did not find Article 5, § 7 to be unconstitutional in any manner, nor does the Attorney General have the authority to require a two (2) year term.

12. Furthermore, the Judicial Districts Board is created by the Texas Constitution, Article V, Section 7-A, which among other powers, is empowered to internally administer judicial assignments within the affected districts.

The Court's opinion did not hold the Board's authority to administer internal affairs to be unconstitutional.

13. Without regard to these constitutional limitations, the Attorney General's proposed interim plan constitutes a settlement which:

a. Clearly does not take into account all necessary factors of the class of judges affected.

b. Is a clear effort to preclude an appeal of right by affected class members, and

c. Would create turmoil and confusion as to the internal administration of trial dockets which could substantially impair the rights of litigants in civil cases, the rights of defendants in criminal cases, and the ability to fairly assign judges for the trial of cases.

14. It is unwarranted to deny these Intervenors a right to intervene because they will be left without representation as to the proposed plans before the Court and will be denied the right to appeal clearly warranted by the Court's Order.

15. Because of the lack of adequate representation, any action by this court would not be binding upon Intervenors and no action should be taken by the Court until this issue is fully resolved. It is settled law that where there is not adequate representation, parties are not bound by any judgment. A case of this nature, extent, importance, and complexity, with its broad effects, should not proceed without the Defendants having proper representation. Intervenors' interests as well as the interest of other judges and the people of Texas cannot be validly and determined with finality under the present circumstances.

16. Because of the crucial importance of this matter, the great expense which will be involved in any relief (interim or otherwise) that this Court determines, the cloud cast on this case and the conduct of the Attorney General should not be permitted to continue as to these Intervenors who are directly affected as are other District Judges, have no adequate representation, and thus any judgment entered will not be binding on them or others similarly situated.

17. The Bexar County District Judge Intervenors,

therefore, are entitled to intervene in this action as a matter of right under Rule 24(a), and request that the Court permit their intervention in this action only for the purposes being afforded an opportunity to be heard and a right to participate in the claims made regarding Bexar County and any proposed relief, either interim or permanent, affecting election of judges in Bexar County.

PERMISSIVE INTERVENTION PURSUANT TO RULE 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

18. The Bexar County District Judge Intervenors request as an alternative to their claim to intervention as a matter of right under Rule 24(a) that the Court grant them permissive intervention under Rule 24(b).

19. The Bexar County District Judge Intervenors are substantially prejudiced by the claims of Plaintiffs, and have defenses with issues of law and fact which are both common to those of the State Defendants and have additional defense.

20. As in their claim to intervention as a matter of right, the Bexar County District Judge Intervenors request that the Court allow them to intervene under Rule 24(b) only

for the purposes of being afforded an opportunity to be heard and a right to participate in the claims asserted in this action about Bexar County and any relief, either interim or permanent, affecting the election of State Court Judges in Bexar County.

21. Intervention in this action by the Bexar County District Judge Intervenors will not unduly delay or prejudice the rights of the original parties. Their Motion is timely filed because no final judgment has been entered by the Court and its filing is contemporaneous with our understanding of the Court's deadline for consideration of plans.

REQUESTS FOR RELIEF

21. Accordingly, the Bexar County District Judge Intervenors request that the Court grant their Motion to Intervene under Rule 24(a) for the limited purposes of defending their interests against Plaintiffs' claims for relief in Bexar County, Texas, and any relief affecting the election of judges in Bexar County.

22. The Bexar County District Judge Intervenors

request alternatively that the Court grant their Motion to Intervene under Rule 24(b) for the limited purposes of defending their interests against Plaintiffs' claims for relief in Bexar County, Texas, and any relief affecting the election of judges in Bexar County.

23. The Bexar County District Judge Intervenors request that if the Court grants this Motion under either Rule 24(a) or 24(b) the Court consider as filed for all purposes in this action the signed, original Intervention of Judges Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon MacRae, and Michael P. Peden as Defendants attached to this Motion as Exhibit A.

Respecfully submitted,

[Caption]

STATE DEFENDANTS' RESPONSE TO MOTION TO INTERVENE BY JUDGES RICKHOFF, REED, SPECIA, HARLE, MACRAE, AND PEDEN

The State Defendants reply as follows to the motion to intervene filed by six state district judges sitting in Bexar County ("Bexar County judge-intervenors"):

Without conceding the validity of the assertions made in the intervention motion and supporting documents, the State Defendants do not oppose the motion insofar as the Bexar County judge-intervenors seek to intervene in their individual, or personal, capacities. In its rulings concerning the attempted intervention of thirteen Travis County judges, this Court has held that personal capacity intervention by sitting judges may be appropriate whereas official capacity intervention is not. In an appeal arising out of this case, the Fifth Circuit has agreed, by holding that sitting district judges have no legally cognizable interest in this case in their official capacity. See *LULAC v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989).

Respectfully submitted,

FILED JAN 2, 1990

ORDER

BEFORE THIS COURT are the parties with their respective Proposed Interim Plans, Motions to Certify this Court's Memorandum Opinion and Order, of November 8, 1989, for Interlocutory Appeal, and Motion of Bexar County District Judges to Intervene in the above captioned cause.

This case is reminiscent of several lines of a recent song, I'm for Love, by Hank Williams, Jr. The lyric goes,

> "The City is against the county,
> The county is against the state,
> The state is against the government, and
> the highway still ain't paved."

In this case the Governor has been against the Attorney General, the Attorney General against the Legislature, the Judges against this Court, and the system is still flawed. This is a regrettable situation, but it can't be helped. The Hank Williams song goes on to say "But I'm for love, and I'm for happiness."

This case was filed on July 11, 1988 and originally set for trial on February 13, 1989. The Court was persuaded,

at least on one occasion, to continue the trial to give the Texas Legislature a chance to address the issue during its Regular Session. This Court continued the above captioned cause to April 17, 1989 to await the United States Supreme Court's disposition of the Petition for Writ of Certiorari in the case of Roemer v. Chisom. The Court again continued the case to July 11, 1989, based on oral Motions to Continue made on the record during a hearing on Motions to Intervene held by this Court on February 27, 1989. The Court continued the trial to September 18, 1989, because of a conflict of settings with one of the attorneys. At the conclusion of the trial in September, the Court was requested to hand down its opinion prior to the convening of the Texas Legislature in Special Session so that a violation (if one was indeed found) could be looked at and perhaps remedied during the Special Session.

This Court specifically reserved ruling upon Plaintiffs' Motion for an Order enjoining further use of the at-large election scheme in the affected counties until the State Legislature had an opportunity to offer a remedial plan. The

Legislature went into Special Session on November 13, 1989, some five days after entry of this Court's November 8, 1989 Order. Governor Clements deemed it advisable not to submit the question of judicial redistricting to the Special Session. The governor did, however, request that he and this Court meet and discuss the matter. The meeting was held, and attorneys for both Plaintiffs and Defendants were present. The Governor advised the Court that no remedy would be forthcoming until some time after the March 13, 1990 Primary Elections. The Governor requested that the matter be delayed until the Regular Session of the Legislature in January, 1991. He further advised the Court that, if this was not satisfactory, he would call a Special Session some time in April or May of 1990 and request the Legislature to study and take whatever action might be necessary to remedy the situation.

The timing is perhaps unfortunate. There will be a census taken in 1990, which may reflect some changes in population in the nine counties involved. Our Legislature meets in Regular Session only in odd years and inevitably

somewhere down the line the method of selection or election of State District Judges will have to be submitted to the voters of Texas. The Court is of the opinion that a delay until after the Primary Elections are held in 1990 and a delay until after a Special Session of the Legislature is held in late spring of 1990 and a further delay of implementation of any solution by the Legislature would not be in the interest of justice, would further dilute the rights of minority voters in the target counties in question, and would be inequitable and work an even greater hardship on the judges and courts involved.

Because the Legislature took no action on the matter in Special Session in November and December, 1989, and the refusal of the Supreme Court to grant a writ in Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir. 1988), and the statements of the Governor of the State of Texas, and the imminence of the Primary Elections in 1990, the Court is not inclined to defer action. See Wise v. Lipscomb, 437 U.S. 535 (1978). Under these circumstances, this Court is of the opinion that it may fashion an *interim plan* that the

law, equity and justice require. *Chisom, supra*, at 1192. On December 12, 1989, or shortly thereafter, all parties were advised to file any Proposed Plans and Objections with the Court by December 22, 1989. An Agreed Settlement was entered into by and between the Plaintiffs and Defendants in this matter, but was not approved by some of the Intervenors.

The Court should point out that the State Legislature will have still a third opportunity to propose a permanent remedy consistent with this Court's November 8, 1989 Order should it convene, and should it pass legislation in April or May of 1990.

The plan which follows is strictly an interim plan for the 1990 elections affecting 115 State District Court judicial seats in the nine counties in action. Upon consideration of the Motions, Responses, Objections, letters, exhibits, attachments and arguments of the parties, the Court is of the opinion that the following Orders are appropriate. Accordingly,

IT IS ORDERED that the Joint Motion of Plaintiffs,

Plaintiff-Intervenors and the Attorney General of Texas for Entry of a Proposed Interim Plan is hereby GRANTED IN PART and DENIED IN PART in the following respects:

1. All Defendants and those acting in concert are hereby enjoined from calling, holding, supervising and certifying elections for State District Court Judges in Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties under the current at-large scheme.

2. For the 1990 elections, according to the Secretary of State of Texas, one hundred fifteen (115) District Court elections are scheduled in the counties affected by this Court's Order. The following number of District Courts are up for election by respective county: Harris (36); Dallas (32); Tarrant (14); Bexar (13); Travis (6); Jefferson (6); Lubbock (3); Ector (3); and Midland (2).

Under this Interim Plan, District Court Elections in Harris, Dallas, Tarrant and Bexar Counties shall be selected from existing State Legislative House District lines as indicated in Attachment A. District Court Elections in Travis County shall be from existing Justice of the Peace

Precinct Lines. See Attachment A. District Court Elections in Jefferson, Lubbock, Ector and Midland Counties shall be according to existing County Commissioner Precinct Lines. *Id.* Each county shall be designated by a District Number, and each election unit by subdistrict number.

3. Each candidate shall run within a designated subdistrict and be elected by the voters in the subdistrict. Consistent with the Texas Constitution, each candidate must be a resident of his or her designated judicial district (which is countywide), but need not be a resident of the election subdistrict.

4. Elections shall be non-partisan. Each candidate shall select the election subdistrict in which he or she will run by designated place. Candidates in Dallas, Tarrant, Bexar, Ector and Midland Counties shall file an application for a place on the election ballot with the County Elections Administrator. Tex. Elec. Code Ann. §31.031 et seq. (Vernon 1986). Candidates in Harris, Travis, Jefferson and Lubbock Counties shall file such an application with the County Clerk of those counties or the County Tax Assessor-

Collector, depending on the practice of that particular county. Tex. Elec. Code Ann. §§31.1031 *et seq.*, 31.091 (Vernon 1986).

5. All terms of office under this Interim Plan shall be for four (4) years. Tex. Const. Art. V, § (1976, amended 1985). This Court is of the opinion that a two-year term is unfair to both those beginning and those ending their judicial careers.

6. Elections shall take place the first Saturday of May, 1990, with Run-off Elections to take place the first Saturday of June, 1990. Tex. Elec. Code Ann. §41.001(b)(5) (Vernon Supp. 1989).

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on March 26, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

8. In 1991, the Administrative Judge of the countywide district shall designate:

(1) Any courts of specialization in terms of

docket preference; and

(2) The District Court numbers in use prior to the Interim Plan's adoption. Successful incumbents shall have preference in such designation.

9. Current jurisdiction and venue of the District Courts remain unaffected, subject to modification by rule of the Supreme Court of Texas.

10. There shall be no right of recusal of judges elected under this plan. This Court is of the view that such a measure would be extremely disruptive to District Court dockets, administratively costly and could be the source of abuse by attorneys attempting to gain continuances of their cases.

IT IS FURTHER ORDERED that the above *Interim Plan* applies only to the 1990 State District Court Judicial Elections in the nine target counties at issue in this case. If the Texas Legislature fails to fashion a permanent remedy by way of a Special Called Session in the spring of 1990, then this Court will put into effect a Permanent Plan for the election of State District Court Judges in the nine target

counties in question.

IT IS FURTHER ORDERED that the Motions of Defendant-Intervenor JUDGE SHAROLYN WOOD, Defendant-Intervenor JUDGE HAROLD ENTZ and the State Defendants to Certify this Court's Memorandum Opinion and Order of November 8, 1989 as modified for clerical corrections on November 27, 1989 and December 26, 1989 for Interlocutory Appeal pursuant to 28 U.S.C. §1292(b) is hereby GRANTED IN PART.

IT IS FURTHER ORDERED that to the extent that such Motions request a stay of further proceedings in the above captioned cause such Motions are hereby DENIED.

IT IS FURTHER ORDERED that the Motion of Bexar County Judges TOM RICKOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE and MICHAEL P. PEDEN to Intervene as Defendants in the above captioned cause is hereby DENIED.

This Court, of course, has granted the right for an Interlocutory Appeal. The request to stay proceedings pending the appeal is DENIED, because the Court does not

feel that District Judges should be continued in office for an indefinite period of time. The right of the electorate to select judges in the year 1990 should not be denied unless, of course, interim action is taken by the Texas Legislature which changes the method of the selection and election of judges. The pressing need for the administration of justice in our state courts is recognized. It is the opinion of this Court that the plan set forth herein is the least disruptive that can be effected at this juncture. To allow Primary Elections in 1990 to be held in the same manner as they were in 1988 would be contra to the dictates of Fifth Circuit law and the Congressional Mandate of the Voting Rights Acts. Recognition that the November 8, 1989 Judgment has far-reaching effects is the reason for the allowance of an expedited appeal, and again the Court would encourage the Governor to call a Special Session to address the matter and, further, would request that the State Legislature remedy the current situation, as the Court is firmly of the opinion that any remedy other than this interim remedy should be done by duly elected legislators.

SIGNED and ENTERED this 2nd day of January, 1990.

LUCIUS D. BUNTON
Chief Judge

Attachment A

HARRIS COUNTY
(District 401)

PLACE	DISTRICT NUMBER	COUNTY	SUBDIST. NUMBER
1	401	Harris	*HD-125
2	401	Harris	HD-126
3	401	Harris	HD-127
4	401	Harris	HD-128
5	401	Harris	HD-129
6	401	Harris	HD-130
7	401	Harris	HD-131
8	401	Harris	HD-132
9	401	Harris	HD-133
10	401	Harris	HD-134
11	401	Harris	HD-135
12	401	Harris	HD-136
13	401	Harris	HD-137
14	401	Harris	HD-138
15	401	Harris	HD-139
16	401	Harris	HD-140
17	401	Harris	HD-141
18	401	Harris	HD-142
19	401	Harris	HD-143
20	401	Harris	HD-144
21	401	Harris	HD-145
22	401	Harris	HD-146
23	401	Harris	HD-147
24	401	Harris	HD-148
25	401	Harris	HD-149
26	401	Harris	HD-150
27	401	Harris	HD-132
28	401	Harris	HD-139
29	401	Harris	HD-147
30	401	Harris	HD-148
31	401	Harris	HD-131

32	401	Harris	HD-146
33	401	Harris	HD-143
34	401	Harris	HD-142
35	401	Harris	HD-141
36	401	Harris	HD-138

* "HD" indicates Texas House of Representatives Districts.

DALLAS COUNTY
(District 402)

PLACE	DISTRICT NUMBER	COUNTY	SUBDIST. NUMBER
1	402	Dallas	HD-98
2	402	Dallas	HD-99
3	402	Dallas	HD-100
4	402	Dallas	HD-101
5	402	Dallas	HD-102
6	402	Dallas	HD-103
7	402	Dallas	HD-104
8	402	Dallas	HD-105
9	402	Dallas	HD-106
10	402	Dallas	HD-107
11	402	Dallas	HD-108
12	402	Dallas	HD-109
13	402	Dallas	HD-110
14	402	Dallas	HD-111
15	402	Dallas	HD-112
16	402	Dallas	HD-113
17	402	Dallas	HD-114
18	402	Dallas	HD-100
19	402	Dallas	HD-114
20	402	Dallas	HD-111
21	402	Dallas	HD-110
22	402	Dallas	HD-102
23	402	Dallas	HD-108
24	402	Dallas	HD-107
25	402	Dallas	HD-106
26	402	Dallas	HD-105
27	402	Dallas	HD-104
28	402	Dallas	HD-103
29	402	Dallas	HD-98
30	402	Dallas	HD-99
31	402	Dallas	HD-101
32	402	Dallas	HD-109

TARRANT COUNTY
(District 403)

PLACE	DISTRICT NUMBER	COUNTY	SUBDIST. NUMBER
1	403	Tarrant	HD-89
2	403	Tarrant	HD-90
3	403	Tarrant	HD-91
4	403	Tarrant	HD-92
5	403	Tarrant	HD-93
6	403	Tarrant	HD-94
7	403	Tarrant	HD-95
8	403	Tarrant	HD-96
9	403	Tarrant	HD-97
10	403	Tarrant	HD-90
11	403	Tarrant	HD-95
12	403	Tarrant	HD-94
13	403	Tarrant	HD-93
14	403	Tarrant	HD-92

BEXAR COUNTY
(District 404)

PLACE	DISTRICT NUMBER	COUNTY	SUBDIST. NUMBER
1	404	Bexar	HD-115
2	404	Bexar	HD-120
3	404	Bexar	HD-116
4	404	Bexar	HD-124
5	404	Bexar	HD-123
6	404	Bexar	HD-122
7	404	Bexar	HD-121
8	404	Bexar	HD-118
9	404	Bexar	HD-124
10	404	Bexar	HD-117
11	404	Bexar	HD-119
12	404	Bexar	HD-118
13	404	Bexar	HD-115

TRAVIS COUNTY
(District 405)

PLACE	DISTRICT NUMBER	COUNTY	SUBDIST. NUMBER
1	405	Travis	**JP-1
2	405	Travis	JP-2
3	405	Travis	JP-3
4	405	Travis	JP-4
5	405	Travis	JP-5
6	405	Travis	JP-4

** "JP" indicates Justice of the Peace Precincts.

JEFFERSON COUNTY
(District 406)

PLACE	DISTRICT NUMBER	COUNTY	SUBDIST. NUMBER
1	406	Jefferson	***CC-1
2	406	Jefferson	CC-2
3	406	Jefferson	CC-3
4	406	Jefferson	CC-4
5	406	Jefferson	CC-4
6	406	Jefferson	CC-3

*** "CC" indicates County Commissioner Precincts.

LUBBOCK COUNTY
(District 407)

PLACE	DISTRICT NUMBER	COUNTY	SUBDIST. NUMBER
1	407	Lubbock	CC-3
2	407	Lubbock	CC-4
3	407	Lubbock	CC-2

ECTOR COUNTY
(District 408)

PLACE	DISTRICT NUMBER	COUNTY	SUBDIST. NUMBER
1	408	Ector	CC-2
2	408	Ector	CC-3
3	408	Ector	CC-4

MIDLAND COUNTY
(District 409)

PLACE	DISTRICT NUMBER	COUNTY	SUBDIST. NUMBER
1	409	Midland	CC-3
2	409	Midland	CC-4

FILED JAN 11, 1990

ORDER

BEFORE THIS COURT is the Motion of Attorney General Jim Mattox on behalf of the State of Texas to Alter this Court's Order of January 2, 1990; the Response thereto of Harris County District Judge Sharolyn Wood; and the Response thereto of Plaintiffs LULAC et al., Plaintiff-Intervenors Jesse Oliver, et al., and Plaintiff-Intervenors Houston Lawyers Association et al. Having considered said Motion and Responses, the Court is of the opinion that said Motion should be denied.

The Court is further of the opinion that other changes to certain terms of the injunction contained in that January 2, 1990 Order are proper. Specifically, the Court herein modifies the Order for the limited purpose of delaying the elections ordered pursuant to its Order, and removing the expedited rights of appeal previously granted in this matter.

The Court believes that delaying judicial elections pursuant to its Order of January 2, 1990 is desirable for several reasons. First, the Court notes that Governor Bill

Clements recently called a special session of February 27, 1990, to deal specifically with Texas' system of selecting judges. In the interests of comity and Federalism, legislatively directed remedial measures are preferable to measures ordered by this Court. Delaying the judicial elections ordered by this Court will serve these interests by giving the Legislature additional time. Second, judicial elections will still take place in 1990 under the modified Order, thus minimizing disruption of the Texas judiciary. Third, delaying court-ordered judicial elections will provide additional time for the United States Department of Justice to consider any remedy adopted by the Legislature before such elections occur. Fourth, delaying these elections will remove the need for expedited appeal to the Fifth Circuit by providing additional time for that Court to consider and rule upon this Court's Order before court-ordered judicial elections occur.

The Court urges the Legislature to consider in its deliberations a quotation from President Harry S. Truman, who said, "[w]e must build a better world, a far better

world--one in which the eternal dignity of man is respected."

I. The Attorney General's Motion is Properly Asserted Pursuant to Rule 59(e), Fed. R. Civ. P., and This Court Retains Jurisdiction to Modify Its Order of January 2, 1990.

The Defendant-Intervenor Judge Wood of Harris County appears to question the effect of the Attorney General's Motion on the notices of appeal filed in this case by herself and Judge Entz, and the powers of this Court to modify the terms of the injunction contained in its Order of January 2, 1990. There is no serious dispute before the Court that the parties to this case have the right under 28 U.S.C. Section 1292(a)(1) to appeal this Court's Order of January 2, 1990. If that Order were a judgment as to which the Attorney General's Motion is properly asserted under Rule 59(e), then the Parties' notices of appeal are ineffective, the Court retains jurisdiction to modify the judgment, and the deadlines for appeal are extended according to Fed. R. App. P. 4(b)(4). The Court believes that Order is such a judgment, and that this is the correct analysis.

A "judgment" for purposes of Rule 59(e), which provides for the amendment of a judgment and the postponement of the time for filing an appeal, is defined in Rule 54(a). See Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE Section 2651 and cases cited therein. Rule 54(a) defines judgment as an "appealable order." 28 U.S.C. Section 1292(b) undisputedly makes this Court's Order of January 2, 1990 appealable of right. Therefore a motion to alter or amend the judgment is properly asserted under Rule 59(e).

The Attorney General's Motion would properly be brought under Rule 62(c), if jurisdiction of the case were already lodged in the court of appeals, for example where a Rule 59(e) motion was not timely made and appeal was taken, or a Rule 59(e) motion was made and ruled upon, and appeal subsequently taken.

The Court assumes for the purposes of this Motion that there exist other circumstances that would make a Rule 59(e) Motion improper here, although the Court takes pains to note that the parties have not cited the Court to such

circumstances, and the Court in examining its jurisdiction has so far found none. In that event, Judge Wood contends, the Attorney General's Motion is one properly asserted under Rule 62(c), under which Rule this Court's modification powers are curtailed.

The Court also assumes that its sua sponte alteration of a judgment, that is independent of and goes beyond the alteration requested by a party under Rule 59(e), might be reviewed under the standard of Rule 62(c). The problem is that the timely filing of a Rule 59(e) motion, which the Court believes has been done here, suspends the appeal process and renders Rule 62(c) technically inapplicable because the case is not on appeal. Absent appeal, a district court has complete power over its interlocutory orders. *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623 (2nd Cir. 1962).

It is important to note that this Court has consistently voiced its preference for the Texas authorities devising a plan for judicial elections consistent with the Voting Rights Act, with reasonable dispatch, and therefore has considered

and styled its January 2, 1990 injunction as an interim plan. The Order is, of course, binding and effective if, and to the extent, the Legislature fails to act. If the Legislature devises an acceptable plan under the Voting Rights Act this lawsuit, and the Court's injunction along with it, would likely become moot. Of course, an argument could be made that this Court's interim plan of redistricting, because conditional in this sense, is not a judgment at all until the contingency has been removed, and therefore is not even appealable. In any event, this Court's overall plan of encouraging legislative redistricting is, the Court believes, relevant to considering, under the law of Rule 62(c), what constitutes a modification of an injunction "in aid of appeal."

In sum, the Federal Rules of Civil Procedure do not seem to provide a neat category for classifying motions on equitable remedies such as the one at issue. This Court is of the opinion that the Attorney General's Motion is one properly brought under Rule 59(e) because this Court's Order of January 2, 1990 is a "judgment" within the meaning of Rule 54(a). However, in the event this

characterization is error, as Judge Wood seems to contend it is, the Court believes it proper to apply the more restrictive analysis under Fed. R. Civ. P. Rule 62(b) as set out in cases cited by the parties.

II. Alternatively, This Court Possesses Jurisdiction to Make Modifications to Its January 2, 1990 Order as Ordered Herein Pursuant to Rule 62(b), Fed. R. Civ. P.

Judge Wood challenges this Court's jurisdiction to entertain a motion to modify its January 2, 1990 Order, and presumably as well the Court's jurisdiction to modify said Order sua sponte. However, despite Judge Wood's artful choice of quotations from pertinent case law, the Court is not persuaded that it lacks jurisdiction to make certain changes in its Order even if the injunction contained therein is properly on appeal.

Once appeal is taken from an interlocutory judgment (as the Court assumes for discussion purposes that it has been here), Fed. R. Civ. P. 62(c) provides that "the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal ...." The scope

of this Court's power under Rule 62(c) has most recently been the subject of analysis by the Fifth Circuit in *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817 (5th Cir. 1989). Under the holding in *Coastal*, this Court is definitely constrained insofar it lacks authority to dissolve the injunction on appeal. *Id.* at 821. But regarding less radical modifications, the Court is directed to limit the exercise of its power to "maintaining the status quo." *Id.* at 820.

Judge Wood would have the Court interpret "maintaining the status quo" to mean that this court may do nothing except "in aid of the appeal." *Willie v. Continental Oil Co.*, 746 F.2d 1041 (5th Cir. 1984). The Fifth Circuit applied this directive in *Willie* to divest the District Court of jurisdiction to modify a judgment under Rule 60(b) because of inadvertence or excusable neglect, where substantive rights of the parties were at stake. *Id.* at 1045. In *Willie*, the parties sought to have the District Court correct its judgment to incorporate a mistakenly-omitted stipulation regarding the percentage of liability to be borne by one of the defendants. The District Court was empowered to deny

such a motion because denial would be "in furtherance of the appeal". But had the District Court wished to grant the Rule 60(b) motion, leave of the Court of Appeals would have been required. *Id.* at 1046.

In the Coastal case, however, the Fifth Circuit seemed to impose a different standard of "maintaining the status quo," and defining that standard to mean that a district court may not take action, such as vacating an injunction, that would presumably divest the court of appeals from jurisdiction while the issue is on appeal. *Coastal*, *supra*, at 820. Cases cited in the *Coastal* opinion consistently deal with granting or staying injunctions during the pendency of appeal. *Id.* Consistent with the analysis expressed in the Attorney General's brief, this Court interprets *Coastal* to say that it may not vacate the injunction now in issue while it is on appeal. No such action is contemplated.

Even if the "in aid of appeal" standard set out in *Willie* should guide the Court, it would seem that the modifications now ordered, which primarily give the Legislature additional time to consider redistricting, does not violate that standard.

Accordingly, this Court's Order of January 2, 1990 will be amended.

IT IS ORDERED that this Court's Order of January 2, 1990 be, and is hereby amended pursuant to the following directives only.

Item numbered "6" at pages 6 and 7 is amended to read as follows:

6. Elections shall take place on November 6, 1990 with runoff elections, if and where necessary, on December 4, 1990.

Item numbered "7" at page 7 is amended to read as follows:

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on September 19, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

IT IS FURTHER ORDERED that any rights c expedited appeal granted in this matter be, and are hereby

RESCINDED.

SIGNED AND ENTERED this 11th day of January, 1990.

s/_____
LUCIUS D. BUNTON
CHIEF JUDGE

(16) (16)

Nos. 90-813, 90-974

FILED
APR 15 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL JOINT APPENDIX

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CERTIORARI GRANTED JANUARY 18, 1991

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Attorneys for Dallas County Respondents

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1. Plaintiffs' Second Amended Complaint 2a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), *et al.*,

Plaintiffs,

HOUSTON LAWYERS' ASSOCIATION, *et al.*,

Plaintiff-Intervenors

vs.

CIVIL ACTION #
MO 88-CA-154

JIM MATTOX, Attorney General of the State of Texas, *et al.*,

Defendants

SHAROLYN WOOD, and F. HAROLD ENTZ,

Defendant-Intervenors

PLAINTIFFS' SECOND AMENDED COMPLAINT

I. INTRODUCTION

1. The members of Plaintiffs LULAC, LULAC COUNCIL #4434 and LULAC COUNCIL #4451 and the named individual Plaintiffs are Mexican-American and Black citizens of the State of Texas. They bring this action pursuant to 42 U.S.C. 1971, 1973, 1983, 1988 to redress a

denial, under color of state law, of rights, privileges or immunities secured to Plaintiffs by the said laws and by the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

2. Plaintiffs seek a declaratory judgment that the existing at large scheme of electing district judges in the target areas of the State of Texas violates Plaintiffs' civil rights in that such method illegally and/or unconstitutionally dilutes the voting strength of Mexican-American and Black electors; Plaintiffs seek a permanent injunction prohibiting the calling, holding, supervising or certifying of any future elections for district judges under the present at large scheme in the target areas; Plaintiffs seek the formation of a judicial districting scheme by which district judges in the target areas are elected from districts which include single member districts; Plaintiffs seek costs and attorneys' fees.

II. JURISDICTION

3. Jurisdiction is based upon 28 U.S.C. 1343 (3) & (4), upon causes of action arising from 42 U.S.C. 1971, 1973, 1983, & 1988, and under the Fourteenth and Fifteenth

Amendments to the U.S. Constitution. Declaratory relief is authorized by 28 U.S.C. 2201 & 2202 and by Rule 57, F.R.C.P.

III. PLAINTIFFS

4. Plaintiff LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) is a statewide organization whose members are United States Citizens of Mexican American and black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in the various counties.

5. LULAC Council No. 4434 is a local organization whose membership is composed of United States Citizens most of whom are of Mexican-American and Black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in Midland County. LULAC Council No. 4451 is a local organization whose membership is composed of United States Citizens most of whom are of Mexican-American or Black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in Ector County.

6. Plaintiff CHRISTINA MORENO is a United States Citizen of Mexican-American descent and is a resident taxpayer of the State of Texas, and is qualified to vote for district judges in Midland County.

7. Plaintiff AQUILLA WATSON is a Black United States Citizen and is a resident taxpayer of the State of Texas, and is qualified to vote for district judges in Midland County.

8. Plaintiff MATTHEW W. PLUMMER, Sr. is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Harris County.

9. Plaintiff JIM CONLEY is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Bexar County.

10. Plaintiff VOLMA OVERTON is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Travis County.

11. Plaintiff WILLARD PEN CONAT is a Black

United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Fort Bend County.

12. Plaintiff GENE COLINS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Ector County.

13. Plaintiff AL PRICE is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Jefferson County.

14. Plaintiff THEODORE HOGROBROOKS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Smith County.

15. Plaintiff ERNEST M. DECKARD is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Smith County.

16. Plaintiff MARY ELLEN HICKS is a Black United States Citizen and is a resident taxpayer of the State of Texas; she is qualified to vote for district judges in

Tarrant County.

16a. Plaintiff REV. JAMES THOMAS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Galveston County.

IV. PLAINTIFF INTERVENORS

17. Members of the HOUSTON LAWYERS' ASSOCIATION, ALICE BONNER, WELDON BERRY, FRANCIS WILLIAMS, REV. WILLIAM LAWSON, DELOYD T. PARKER, BENNIE McGINTY, JESSE OLIVER, FRED TINSLEY, JOAN WINN WHITE, and Members of THE BLACK LEGISLATIVE CAUCUS are Black United States Citizens and are resident taxpayers of the State of Texas; they are qualified to vote for district judges in Texas.

V. DEFENDANTS

18. Defendant JIM MATTOX is the Attorney-General of the State of Texas, and is the chief law enforcement officer of the state and as such, is charged with the responsibility to enforce the laws of the state. Defendant

JACK RAINS is the Secretary of State of the State of Texas, and is the chief elections officer of the state and as such, is charged with the responsibility of administering the election laws of the state. Defendants THOMAS R. PHILLIPS, JOHN F. ONION, RON CHAPMAN, THOMAS J. STOVALL, JAMES F. CLAWSON, JR., JOE E KELLY, JOE B. EVINS, SAM M. PAXSON, WELDON KIRK, CHARLES J. MURRAY, RAY D. ANDERSON, LEONARD DAVIS and JOE SPURLOCK, II are members of the JUDICIAL DISTRICTS BOARD created by Art. V. Sec. 7a of the Texas Constitution, and pursuant to Art. 24.941 et. seq. Texas Government Code. They have the duty to reapportion judicial districts within the State of Texas.

VI. FACTUAL ALLEGATIONS

19. District judges are elected either from judicial districts which are coterminous with and wholly contained within a county, or from judicial districts which are composed of several entire counties.

20. In those counties which contain more than one

judicial district, the present election system is an at large scheme with the equivalent of numbered places, the majority rule requirement, and staggered terms.

21. The following counties, which are being challenged in this lawsuit, elect the following number of district judges and, according to the 1980 U.S. Census, contain the following population:

COUNTY	# OF JUDGES ELECTED	TOTAL POP.	S.S. POP. (%)	BLK POP. (%)	CM. %*
Harris	59	2,409,544	369,075(15.3)	473,698(19.7)	35.0
Dallas	36	1,556,549	154,560(9.9)	287,613(18.5)	28.4
Bexar	19	988,800	460,911(46.6)	69,201(7.0)	53.6
Tarrant	23	860,880	67,632(7.9)	101,183(11.8)	19.7
Travis	13	419,335	72,271(17.2)	44,988(10.7)	27.9
Jefferson	8	250,938	10,279(4.1)	70,810(28.2)	32.3
Lubbock	5	211,651	41,428(19.6)	15,780 (7.5)	27.0
Galveston	5	195,940	23,557(12.0)	36,328(18.5)	30.6
McLennan	4	170,755	14,988(8.8)	27,254(16.0)	24.7
Fort Bend	3	130,846	26,656(20.4)	20,420(15.6)	36.0
Smith	4	128,366	4,037(3.1)	28,215(22.0)	25.1

Ector	4	115,374	24,831(21.5)	5,154 (4.5)	26.0
Midland	3	82,636	12,323(14.9)	7,119 (8.6)	23.5
El Paso, Hudspeth, and Culberson**	11	485,942	282,691(58.2)	18,162 (3.7)	61.9

* Combined Minority

** Eight district judges are elected at large within El Paso County; the other three are elected at large within the three county area of El Paso, Hudspeth, and Culberson Counties.

22. The following counties comprise a judicial area that elects three (3) judges at large: EL PASO, CULBERSON, and HUDSPETH. This area contains enough minorities that are sufficiently geographically concentrated that if single member districts were created, at least one of those districts would be able to elect a minority.

23. The above areas elect 197 district judges. Each area contains enough minorities that are sufficiently geographically concentrated so that if single member districts were created, at least one of those districts in each area would be able to elect a minority.

24. Upon information and belief, in the above named areas minorities are politically cohesive.

25. Upon information and believe in the above cited areas, the white majority votes sufficiently as a block to enable it--in the absence of special circumstances, such as the minority candidate running unopposed--usually to defeat the minority's preferred candidate.

26. Upon information and belief, in the above challenged areas, the at large election scheme interacts with social and historical conditions to cause an inequality in the opportunity of hispanic and/or black voters to elect representatives of their choice as compared to white voters.

27. Upon information and belief, the following are the names of the presently sitting judges' elected from the above counties:

COURT	JUDGE	COUNTY	VOTING PRECINCT	RACE/ ETHNIC
11th	Mark Davidson	Harris	224	W
55th	Reagan Cartwright	Harris	178	W
61st	Shearn Smith	Harris	**	W
80th	William R. "Bill" Powel	Harris	040	W
113th	Geraldine B. Tennant	Harris	227	W
125th	Don E. Wittig	Harris	118	W
127th	Sharolyn P. Wood	Harris	282	W
129th	Hugo A. Touchy	Harris	385	W
133rd	Lamar McCorkle	Harris	**	W

151st	Alice Oliver Trevathan	Harris	441	W
152nd	Jack O'Neill	Harris	493	W
157th	Felix Salazar, Jr.	Harris	134	H
164th	Pete Solito	Harris	217	W
165th	Ken Harrison	Harris	413	W
174th	George H. Godwin	Harris	015	W
176th	James Brian Rains	Harris	116	W
177th	Miron A. Love	Harris	034	W
178th	William T. "Bill" Harmon	Harris	129	W
179th	J. Mike Wilkinson	Harris	456	W
180th	Patricia R. Lykos	Harris	626	W
182th	Donald K. Shipley	Harris	261	W
183th	Jay W. Burnett	Harris	567	W
184th	Robert N. Burdette	Harris	356	W
185th	Carl Walker, Jr.	Harris	138	B
189th	Richard W. Millard	Harris	056	W
190th	Wyatt H. Heard	Harris	227	W
208th	Thomas H. Routt	Harris	136	B
209th	Michael T. McSpadden	Harris	148	W
215th	Eugene Chambers	Harris	663	W
228th	Ted Poe	Harris	658	W
230th	Joe Kegans	Harris	222	W
232rd	A.D. Azios	Harris	178	H
234th	Ruby K. Sondock	Harris	434	W
245th	Henry G. Schuble	Harris	305	W
246th	John W. Peavy, Jr.	Harris	228	B
247th	Charles Dean Huckabee	Harris	628	W
248th	Woody R. Densen	Harris	034	W
257th	Norman R. Lee	Harris	628	W
262nd	Doug Shaver	Harris	200	W
263rd	Charles J. Hearn	Harris	351	W
269th	W. David West	Harris	219	W
270th	Ann Tyrrell Cochran	Harris	217	W

280th	Melinda Furche Harmon	Harris	129	W
281st	Louis M. Moore	Harris	297	W
295th	Dan Downey	Harris	441	W
308th	Bob W. Robertson	Harris	430	W
309th	John D. Montgomery	Harris	518	W
310th	Allen J. Daggett	Harris	577	W
311th	Bill Elliott	Harris	221	W
312th	Robert S. Webb, III	Harris	200	W
313th	Robert L. Lowery	Harris	371	W
314th	Robert R. Baum	Harris	296	W
315th	Eric G. Andell	Harris	183	W
333rd	Davie L. Wilson	Harris	466	W
334th	Russel T. Lloyd	Harris	316	W
337th	Jim Barr	Harris	432	W
338th	Mary Bacon	Harris	344	W
339th	Norman E. Lanford	Harris	050	W
351st	Lupe Salinas	Harris	115	H
14th	John M. Marshall	Dallas	1174	W
44th	Candace Tyson	Dallas	1203	W
68th	Gary B. Hall	Dallas	1123	W
95th	Joe B. Brown	Dallas	4418	W
101st	Joseph B. Morris	Dallas	1227	W
116th	Frank Andrews	Dallas	1129	W
134th	Anne A. Packer	Dallas	1176	W
160th	Mark Whittington	Dallas	4418	W
162nd	Catherine J. Crier	Dallas	2277	W
191st	David Brooks	Dallas	2242	W
192nd	Merrill L. Hartman	Dallas	2266	W
193rd	Michael J. O'Neill	Dallas	2260	W
194th	Harold Entz, Jr.	Dallas	1185	W
195th	Joe Kendall	Dallas	1171	W
203rd	Thomas B. Thorpe	Dallas	1103	W
204th	Richard D. Mays	Dallas	1148	W
254th	Dee Miller	Dallas	1176	W
255th	Don D. Koons	Dallas	1227	W
256th	Carolyn Wright	Dallas	3302	B
265th	Keith T. Dean	Dallas	1122	W

282nd	Tom Price	Dallas	1202	W
283rd	Jack Hampton	Dallas	2271	W
291st	Gerry Meier	Dallas	1209	W
292nd	Michael E. Keasler	Dallas	4406	W
298th	Adolph Canales	Dallas	1216	H
301st	Robert O'Donnell	Dallas	2203	W
302nd	Frances A. Harris	Dallas	2222	W
303rd	N. Sue Lykes	Dallas	4437	W
304th	Harold C. Gaither, Jr.	Dallas	4516	W
305th	Catherine J. Stayman	Dallas	2253	W
330th	Theo Bedard	Dallas	1185	W
Crim Dist.1	Ron Chapman	Dallas	2241	W
Crim Dist.2	Larry W. Baraka	Dallas	4453	B
Crim Dist.3	Mark Tolle	Dallas	1187	W
Crim Dist.4	Frances J. Maloney	Dallas	1145	W
Crim Dist.5	Pat McDowell	Dallas	1162	W
70th	Gene Ater	Ector	**	W
161st	Tryon D. Lewis	Ector	**	W
244th	Joseph Connally	Ector	**	W
358th	Bill McCoy	Ector	**	W
19th	Bill Logue	McLennan	**	W
54th	George H. Allen	McLennan	**	W
74th	Derwood Johnson	McLennan	**	W
170th	Joe Johnson	McLennan	**	W
17th	Fred W. Davis	Tarrant	2052	W
48th	William L. Hughes, Jr.	Tarrant	2143	W
67th	George Allen Crowley	Tarrant	4095	W
96th	Jeff Walker	Tarrant	3101	W
141st	Dixon W. Holman	Tarrant	2266	W

153rd	Sidney C. Farrar, Jr.	Tarrant	4130	W
213rd	George S. Kredell	Tarrant	2352	W
231st	Maryellen W. Hicks	Tarrant	1104	B
233rd	William H. Brigham	Tarrant	3151	W
236th	Albert L. White,Jr.	Tarrant	1004	W
297th	Everett Young, Jr.	Tarrant	1004	W
322nd	Frank W. Sullivan, III	Tarrant	3151	W
323rd	Scott D. Moore	Tarrant	4343	W
324th	Brian A. Carper	Tarrant	2012	W
325th	Robert L. Wright	Tarrant	1081	W
342nd	Joe Bruce Cunningham	Tarrant	1081	W
348th	Michael D. Schattman	Tarrant	3151	W
352nd	Bruce Auld	Tarrant	3286	W
360th	V. Sue Koenig Stephenson	Tarrant	3289	W
Crim Dist.1	Louis E. Sturns	Tarrant	4203	B
Crim Dist.2	Lee Ann Dauphinot	Tarrant	1189	W
Crim Dist.3	Don Leonard	Tarrant	1004	W
Crim Dist.4	Joe Drago, III.	Tarrant	1022	W
142nd	Pat M. Baskin	Midland	205	W
238th	Van Culp	Midland	307	W
318th	Dean Rucker	Midland	212	W
53rd	Mary Pearl Williams	Travis	237	W
98th	Jeanne Mourer	Travis	207	W
126th	Joe Hart	Travis	320	W
147th	Mace B. Thurman, Jr.	Travis	256	W
167th	Bob Jones	Travis	328	W
200th	Paul R. Davis Jr.	Travis	320	W
201st	Jerry Dellana	Travis	324	W

250th	Harley Clark	Travis	145	W
261st	Peter M. Lowry	Travis	326	W
299th	Jon N. Wisser	Travis	262	W
331st	Robert A. Perkins	Travis	215	W
345th	Scott McCown	Travis	236	W
353rd	Joe Dihrell	Travis	328	W
58th	Ronald L. Walker	Jefferson	73	W
60th	Gary Sanderson	Jefferson	83	W
136th	Jack R. King	Jefferson	5	W
172nd	Thomas A. Thomas	Jefferson	46	W
252nd	Leonard L. Giblin, Jr.	Jefferson	9	W
279th	Robert P. Walker	Jefferson	46	W
317th	James M. Farris	Jefferson	62	W
Cirm Dis.Ct.	Lawrence Gist	Jefferson	65	W
10th	Ed. Harris	Galveston	**	W
56th	Allan Lerner	Galveston	**	W
122nd	Henry G. Delchite	Galveston	**	W
212th	Roy C. Engelke	Galveston	**	W
306th	Andrew Z. Baker	Galveston	**	W
72nd	Blair Cherry	Lubbock	9	W
99th	Thomas L. Olinlye	Lubbock	11	W
137th	Cecil G. Puryear	Lubbock	18	W
140th	William R. "Bill" Shaver	Lubbock	28	W
237th	John R. McFall	Lubbock	17	W
240th	Charles A. Dickerson	Fort Bend	**	W
268th	Brady G. Elliott	Fort Bend	**	W
328th	Thomas O. Stansbury	Fort Bend	**	W
7th	W.E."Bill" Coats	Smith	16	W
114th	Cynthia Stevens Kent	Smith	37	W
241st	Joe Tunnell	Smith	51	W
321st	Ruth Jackson Blake	Smith	38	W
37th	John Cornyn, III	Bexar	3020	W
45th	Carol R. Haberman	Bexar	3079	W

57th	Charles Gonzales	Bexar	3019	H
73rd	Paul Andrew Mireles	Bexar	3011	H
131st	Rose Spector	Bexar	3018	W
144th	Susan Reed	Bexar	3018	W
166th	Peter Michael Curry	Bexar	3025	W
175th	Phil G. Chavarria, Jr.	Bexar	3019	H
186th	James E. Barlow	Bexar	2009	W
187th	Pat Priest	Bexar	3063	W
224th	Carolyn H. Spears	Bexar	3104	W
225th	John J. Specia, Jr.	Bexar	3048	W
226th	Sid L. Harle	Bexar	3102	W
227th	Mike Machado	Bexar	3038	H
285th	Michael Peden	Bexar	3074	W
288th	Raul Rivera	Bexar	3012	H
289th	Tom Rickoff	Bexar	3089	W
150th	Carleton Spears	Bexar	3108	W
290th	Sharon Sands Mac Rea	Bexar	3090	W
41st	Mary Ann Bramblett	El Paso	088	W
65th	Eduardo S. Marquez	El Paso	**	H
120th	Brunson D. Moore	El Paso	013	W
168th	Jose Troche	El Paso	005	H
171st	Peter S. Pecas	El Paso	006	H
243rd	Herbert E. Marsh, Jr.	El Paso	093	W

346th	Jose J. Baca	El Paso	011	H
327th	Enrigue H. Pena	El Paso	012	H
34th	William E. Moody	Hudspeth, Culberson, El Paso (El Paso County)	007	W
205th	Sam W. Callan	Hudspeth, Culberson, El Paso (El Paso County)	074	W
210th	Sam M. Paxson	Hudspeth, Culberson, El Paso (El Paso County)	011	W

*W-White
B-Black
H-Hispanic

**This information is being gathered

VII. CAUSES OF ACTION

28. The present at large scheme of electing district judges, in the targeted areas, intentionally created and/or maintained with a discriminatory purpose, violates the civil rights of Plaintiffs by diluting their votes, in violation of the United States Constitution and/or,

29. The present at large scheme of electing district judges, in the targeted areas, results in a denial or abridgement of the right to vote of the Plaintiffs on account of their race or color in that the political processes leading

to nomination or election of district judges are not equally open to participation by Plaintiffs in that they have less opportunity than other members of the electorate to elect candidates of their choice, in violation of Section 2 of the Voting Rights Act.

VIII. IMMUNITIES

30. Qualified and absolute immunity do not protect the Defendants because Plaintiffs seek only injunctive and declaratory relief and attorneys' fees. Furthermore, absolute immunity does not protect Defendants because they do not act in any of the capacities which receive immunity at common law. The Defendants are not entitled to Eleventh Amendment immunity because Plaintiffs seek only injunctive and declaratory relief and attorneys' fees.

IX. EQUITIES

31. Plaintiffs have no adequate remedy at ' . other than the judicial relief sought herein, and unless the Defendants are enjoined from continuing the present at large scheme, Plaintiffs will be irreparably harmed by the continuing violation of their statutory and constitutional

rights. The illegal and unconstitutional conditions complained of preclude the adoption of remedial provisions by the electorate. The present electoral scheme is without any legitimate or compelling governmental interest and it arbitrarily and capriciously cancels, dilutes and m..imizes the force and effect of the Plaintiffs' voting strength.

XX. ATTORNEYS' FEES

32. In accordance with 42 U.S.C. 1973-*l*(e) and 1988, Plaintiffs are entitled to recover reasonable attorneys' fees as part of their costs.

XI. PRAYER

33. WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein; that a declaratory judgment be issued finding that the existing method of electing district judges is unconstitutional and/or illegal, null and void; that the Defendants be permanently enjoined from calling, holding, supervising or certifying any further elections for district judges under the present at large scheme; that the Court order that district judges in the targeted counties be elected in a system which

contains single member districts; adjudge all costs against Defendants, including reasonable attorneys' fees; retain jurisdiction to render any and all further orders that this Court may from time to time deem appropriate; and grant any and all further relief both at law and in equity to which these Plaintiffs may show themselves to be entitled.

Respectfully submitted,

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

No. 90-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Can the election of trial judges be challenged under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973?

PARTIES

The participants in the proceedings below were:

League of United Latin American Citizens (LULAC) Local Council 4434, LULAC Local Council 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr. Jom Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Mary Ellen Hicks, Rev. James Thomas, *Plaintiffs;*

The Houston Lawyers' Association, Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, Francis Williams, *Plaintiff-Intervenors;*

Jesse Oliver, Fred Tinsley and Joan Winn White, *Plaintiff-Intervenors;*

The Attorney General of the State of Texas, George Bayoud, Secretary of State of Texas, Thomas R. Phillips, Mike McCormick, Ron Chapman, Thomas J. Stovall, James F. Clawson, John Cornyn, Robert Blackmon, Sam B. Paxson, Weldon Kirk, Jeff Ealker, Ray D. Anderson, Joe

Spurlock II, and Leonard E. Davis, in their capacity as members of the Texas Judicial Districts Board, *Defendants;*

Judge Sharolyn Wood and Judge Harold Entz, *Defendant-Intervenors.*

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No. '90-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 914 F.2d 620 as *LULAC v. Clements*, and is set out at pp. 1a-182a of the appendix to the Petition for a Writ of Certiorari (hereinafter "Pet. App."). The opinion of the United States District Court for the Western District of Texas is not reported and is set out at Pet. App. pp. 183a-304a, except for statistical tables that are an appendix to the district court's opinion. Copies of those tables have been filed under separate cover with the Clerk of the Court

as a Supplemental Appendix to the Petition for Certiorari (hereinafter "Supp. Pet. App."). Two subsequent orders of the district court, both unreported, are set out in the Joint Appendix (hereinafter "J.A.") at pp. 158a and 180a.

JURISDICTION

The decision of the Fifth Circuit was entered on September 28, 1990. The petition for certiorari was filed on November 21, 1990. On January 18, 1991, this Court granted the petition for certiorari and consolidated this case with No. 90-974, *LULAC v. Attorney General of Texas*. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

This case involves § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which provides that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivison are not equally open to participation by members of a class of citizens protected by subdivision (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

This case also involves § 14(c)(1) of the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(c)(1), which provides, in pertinent part, that:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . casting a ballot and having such ballot counted properly with respect to candidates for public or party office and propositions for which votes are received in an election.

STATEMENT OF THE CASE

Introduction

This case involves a challenge to the at-large method of electing district judges in nine counties in the State of Texas.[1] The petitioners are African American voters, many of whom are members of the Houston Lawyers' Association (HLA) (hereinafter "HLA petitioners"). The HLA petitioners intervened in this lawsuit, originally filed by the League of United Latin American Citzens (hereinafter "LULAC petitioners"), alleging that several features of the existing electoral scheme -- in particular, at-large, numbered post elections -- deny them an equal opportunity to participate in the election of district judges in Harris County (Houston) in violation of §2 of the Voting Rights Act, as amended.

Harris County is the largest and most populous county in the State of Texas, encompassing 1,734 square miles. The County has a 1990 Census population of over 2.8 million. The

[1]The counties at issue are: Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland. In each of the counties challenged, more than one district judge is elected to serve the countywide district. Eight of the nine judicial districts challenged by plaintiff-petitioners are coextensive with one county. The remaining district is comprised of two counties. Pet. App. at 95a.

City of Houston, Harris County's major urban center, is the largest city in Texas geographically and by population. The enormous size of the Harris County judicial district is evident when it is compared to West Texas' District 39 -- the smallest judicial district in the state. Harris County is more than 20,000% larger than the District 39.[2] Harris County elects 59 of Texas' 386 district judges, more district judges than any other county in the state.[3]

Although the population of Harris County is nearly 20% African American,[4] and African American candidates have run in 17 contested district judge general elections in the County since 1980, only 2 of the African American candidates have won. Pet.

[2]Johnson, "Simple Justice," Background Report to House Committee on the Judiciary, Texas House of Representatives, November 1990.

[3]Although most district courts exercise both criminal and civil jurisdiction, in metropolitan areas such as Harris County, pursuant to both legislative action and informal arrangements made within the county, the district courts are organized into four specialized areas: civil trial courts, criminal trial courts, juvenile courts and family law courts. *See* "Texas Judicial System Annual Report," Texas Judicial Council, Office of Court Administration, December 1987 at 10; Deposition Summary of Ray Hardy, Trial Transcript Volume 4, Page 254 (references to the trial transcript are hereinafter cited as "TR. at __-__."). In Harris County, there are 25 civil district courts. TR. at 4-254. No African American has ever been elected to a civil district trial seat in Harris County. TR. at 3-207.

[4]The voting age population of Harris County was 18% African American according to both 1980 and 1990 census figures. Texas does not keep voter registration figures by race.

App. at 279a. Currently, only three of Harris County's 59 district judges (5% of the total) are African Americans.[5] "Texas Minority Judges," Office of Court Administration, Texas Judicial Council.

The HLA petitioners specifically alleged that alternative electoral schemes using electoral sub-districts or modified at-large structures[6] could remedy the denial of minority voters' rights in district judge elections in Harris County. J.A. at 20a.

The Challenged Electoral Structure

Under a 1985 amendment to the Texas Constitution, electoral districts for district judges must consist of one or more

[5]These figures are reflected on the statewide level, as well. Although African Americans constitute 12% of Texas' population, they constituted only 2% of the state's district judges (7 of 375) in 1989 (currently 9 of 386). "Texas Minority Judges," Office of Court Administration, Texas Judicial Council, January 31, 1991. In July 1988 when this lawsuit was filed, no African Americans were appellate court judges anywhere in the state of Texas. In fact, between 1980 and 1990, only 1 African American served as an appellate court judge in Texas. During the same time period, only 8 African Americans served as district judges statewide. *Id.*

[6]These alternative electoral schemes included limited voting and cumulative voting, both of which are discussed *infra* at 57-60.

whole counties.[7] *See* Article 5, §7(a)(i), Texas Constitution of 1876, as amended. District judges in Texas have statewide jurisdiction, but sit in the countywide or multi-county district from which they are elected. Candidates for district judge must reside in the county or multi-county district for two years in order to run for office. *See* 1990 Candidates' Guide to Primary and General Elections, Office of the Secretary of State of Texas.

Each candidate for district judge runs for a designated numerical seat within the county or multi-county district, for example, "375th district court." Elections for district judges in Texas are held in even-numbered years at the same time as primary, run-off and general elections for state legislative and municipal offices. Terms are staggered, and district judges serve for four years. District judge candidates, and indeed all judges in Texas, are nominated through party primaries. If no district judge candidate wins a majority in the party primary, then the two top voter-getters must compete in a run-off primary. In the general election, each judicial candidate's political party is

[7]The same amendment provides that districts smaller than a county may be created if approved by a countywide referendum. Yet neither the Constitution nor Texas statute creates any procedure for holding such a referendum. No countywide referendum has ever been held in accordance with this provision.

indicated on the ballot.

District judges in Texas are elected from multimember at-large districts[8] within a winner-take-all[9] election system. Both the multimember and winner-take-all features of Texas' district judge election system were challenged by the HLA petitioners in this action. J.A. at 8a-23a.

The Findings of the District Court

Following a one week trial, the district court made extensive findings of fact and conclusions of law supporting the minority voters' claims of vote dilution in each of the nine targeted counties. Following the standard for determining the existence of vote dilution set by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the district court found that in Harris County: (1) the African American population is sufficiently numerous and geographically compact to constitute a

[8]As the district court noted, "this system is 'at-large' because judges are elected from the entire county rather than from geographic subdistricts within the county." Pet. App. at 190a n.3.

[9]In a winner-take-all system "a *bare* political majority (fifty percent + 1) of the electorate can elect *all* representatives and totally shut out a minority." Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.-C.L.L.Rev. 173, 222 (1989). The remaining 49% of the population may be excluded from electing any candidates of choice.

majority in a number of fairly drawn sub-districts;[10] (2) the African American commmunity is politically cohesive; and (3) white voters vote sufficiently as a bloc so as usually to defeat the candidate of choice of minority voters, absent special circumstances. Pet. App. at 220a-221a.

In addition, the district court made specific findings concerning the list of objective factors (hereinafter "Senate Factors") that Congress identified as relevant to determining the existence of vote dilution.[11] Senate Report No. 97-417, 97th

[10]Plaintiffs demonstrated, in fact, that African Americans could constitute a majority in at least nine judicial electoral sub-districts. Pet. App. at 201a.

[11]These typical objective factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively

Cong., 2nd Sess. (1982) (hereinafter "S. Rep. at __").

Recognizing that among the Senate Report factors the existence of racially polarized voting and the extent to which minorities have been elected to office in the challenged jurisdiction are most significant, *Gingles*, 478 U.S. at 45 n.15, the district court made particularly extensive findings regarding these two factors.

The district court's findings with regard to racially polarized voting were based on the dramatic results of the experts' analyses. In the 17 elections analyzed by the plaintiffs' expert,

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in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiff's evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. at 28-29.

Dr. Richard Engstrom,[12] and the 23 elections analyzed by the defendants' expert, Dr. Delbert Taebel, African Americans and whites voted differently in *every* election. Pet. App. at 224a. While African Americans consistently gave more than 97% of their vote to African American candidates in the 17 judicial elections analyzed by Dr. Engstrom, whites never gave even a bare majority of their votes to an African American candidate. *Id.* at 215a.

Even straight ticket party voting and candidate incumbency failed to garner significant white votes for African American judicial candidates. One example of the virtual refusal of white voters to support African American judicial candidates in Harris County is particularly telling. In 1986, 19 Democratic incumbent judges ran for re-election. *All* 16 white Democratic incumbents were re-elected. *All* three African American Democratic incumbents lost.[13] TR. at 3-164.

Overall, Dr. Engstrom testified that, since 1980, 52% of

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[12]Dr. Engstrom's work on quantitative analyses was cited with approval by this Court in *Gingles*, 478 U.S. at 53 n.20.

[13]These 19 Democratic incumbents shared campaign strategy and tactics, posing for a group photograph which was mailed to voters throughout the County as part of a collective party effort to retain judicial seats held by Democrats. TR. at 3-209. Yet only the African American incumbents lost their bids for re-election.

white Democratic candidates have won contested district judge elections in Harris County, while only 12.5% of African American Democratic judicial candidates have won. TR. at 3-134-135.

The district court also found that of the 17 African Americans who have run in contested district judge elections in Harris County since 1980, only 2 have won. Pet. App. at 279a. In fact, it was undisputed that no more than three African Americans have ever served simultaneously as district judges in Harris County. TR. at 3-207.

With regard to the remaining Senate Factors, the district court made additional findings which supported the petitioners' claims. The court noted the "well chronicled" and "undisputed" history of discrimination in Texas, that touched upon the right of minorities to vote and participate "in the democratic system governing [the] State." Pet. App. at 274a. This history includes discriminatory legislative reapportionment, *Graves v. Barnes*, 343 F.Supp. 704 (W.D. Tex. 1972), *aff'd in relevant part, rev'd in part on other grounds sub nom.*, *White v. Regester*, 412 U.S. 755 (1973), *on remand*, 378 F.Supp. 640 (1974), racial discrimination in education, *United States v. Texas Education Agency*, 564 F.2d 162 (5th Cir. 1977), *reh'g denied*, 579 F.2d 910 (1978), *cert. denied*, 443 U.S. 915 (1979), and the notorious refusal of the Harris County Democratic party to permit African Americans to vote in the party primary. *Smith v. Allwright*, 321 U.S. 649 (1944).[14] The court's findings were supported by the testimony of lay witnesses who attested to the historical and continued presence of racial discrimination in Texas. *See* TR. at 3-205, 217; 4-8, 16-17, 24-25.

Since 1975, Texas has been subject to the special preclearance provisions of §5 of the Voting Rights Act of 1965. Between 1975 and 1982, when the Act was last amended, the Justice Department had made 130 objections to changes in voting procedures submitted by the State of Texas, because it was unable to conclude that the changes proferred would have neither a discriminatory purpose nor a discriminatory effect on minority voters.[15] *See Voting Rights Act: Hearings on S.53, S.1761,*

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[14]The historical existence of an all-white judiciary in Texas has also been chronicled. *See e.g.*, *Ross v. State*, 233 S.W. 2d 126, 131 (Tex. Crim. App. 1950) ("[a]ll judges since the days of Reconstruction, as well as Justices of the Peace, and also Legislators, have been white persons").

[15]Since that time, the Attorney General has repeatedly objected to other voting changes in Texas, including the addition of 15 district judgeships in 1990, on the grounds that the method of electing district judges in the counties at issue violates §2. *See* Letter of John Dunne, Pet. App. at 305a-308a. A three-judge court later ruled that the objection of the Justice Department was not timely filed, and as such, the additional judgeships were automatically precleared within sixty days of Texas' submission. *Mexican American Bar Association v. Texas*, No.

S.1992 and H.R. 3112 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 97th Cong., 2d Sess. 1783 (1982) (hereinafter "1982 Hearings").

The district court further found that the legacy of racial discrimination in Texas continues to affect adversely the socioeconomic status of minorities in Texas. Pet. App. at 275a. This finding was supported by census data indicating a marked disparity in the education and median income levels of African American and white Texans. Plaintiffs' Exhibit H-08.

The district court found that Harris County uses an unusually large election district for district judge elections. Indeed, the court found that the unusually large size of Harris County "further enhance[s] the problems that minority candidates face when they seek office." Pet. App. at 276a. This conclusion was supported by defendant Thomas Phillips, Chief Justice of the Supreme Court of Texas, who testified that it is more difficult for minority lawyers to raise the funds necessary to mount a successful campaign for district judge in large urban areas such as Harris County. TR. at 5-84.

The district court also found that the requirement that

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district judge candidates run for a specific numbered judicial seat within the county is equivalent to a numbered post system, which prevents the use of bullet, or single-shot[16] voting. Pet. App. at 275a-276a, 276a n.31. The requirement that a candidate for district judge win a majority of the votes cast to win the party primary also enhances the opportunity for discrimination against minorities.[17] Pet. App. at 276a.

Finally, while the district court did not find that the current at-large system of electing district judges is intentionally discriminatory, it was "not persuaded that the reasons offered for its continuation are compelling." Pet. App. at 283a.

Considering the "totality of the circumstances,"[18] the

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[16]"Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." *Gingles*, 478 U.S. at 38 n.5 (citation omitted).

[17]In the Senate Report, Congress specifically identified the use of majority vote requirements, numbered posts and unusually large electoral districts as devices that "may enhance the opportunity for discrimination against the minority group." S.Rep. at 29.

[18]Plaintiff-petitioners made no claims as to Senate Factor 4 -- the existence of a discriminatory candidate slating process in Harris County. As to Senate Factor 6, the court found that racial appeals were used in at least one district judge race in Texas. TR. at 278a. The court made no specific findings on the use of racial appeals in Harris County.

Although an additional factor sometimes probative to the plaintiffs' showing of vote dilution, "[u]nresponsiveness is not an essential part of plaintiffs' case," S. Rep. at 29 n.116, and therefore was not put in issue by the plaintiff-petitioners.

district court concluded that under the challenged electoral scheme, "[p]laintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice" in district judge elections. Pet. App. at 290a-291a.

The district court made no findings about the appropriate remedy for the proven violation, but urged the state legislature, then in special session, to select and approve an alternative district judge election scheme. Pet. App. at 303a. The district court also announced that it would entertain motions to enjoin future state district judge elections "pending the Remedy Phase of this litigation," should the legislature fail to adopt an alternative election system. *Id.*

The District Court's Interim Remedy

On January 2, 1990, following the state legislature's failure to include the issue of judicial redistricting on its special session agenda, the district court entered an order setting out an interim remedy to be used solely for the 1990 election of district judges in the nine counties. J.A. at 158a. This remedy incorporated, in large part, elements of a remedial settlement agreement entered into by the petitioners and the state defendants following the

district court's determination of liability.

In the remedial settlement agreement, the state defendants agreed to the creation of electoral sub-districts for district judges. The district court's interim remedy adopted the sub-district election scheme agreed upon by the state defendants and the petitioners, but abolished the use of party identification in district judge elections.[19] J.A. at 158a-179a. Defendant-intervenors from Harris County, Texas, filed an interlocutory appeal from the district court's liability order and a stay of the district court's interim remedial order. The state defendants also appealed the district court's liability order and the part of the interim remedial order that prohibited the use of partisan elections for district judges. The state defendants did not appeal that part of the remedial order that required the creation of sub-county electoral districts. The interlocutory appeal and stay were granted by the Fifth Circuit on January 11, 1990.

The Case on Appeal

Oral argument was heard before a panel of the Fifth

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[19]Petitioners never challenged the partisan nature of the district judge election system in any of the nine counties.

Circuit in *LULAC* on April 30, 1990. Eleven days after oral argument, the panel reversed the district court opinion in *LULAC* on the ground that the election of trial judges is not covered by §2 of the Voting Rights Act, as amended. The panel decision addressed none of the underlying facts or findings of vote dilution reached by the district court.

Sua sponte, the Fifth Circuit ordered rehearing *en banc* in *LULAC*. Oral argument was heard on June 19, 1990. On September 28, 1990, the Fifth Circuit, again without reference to the merits of the case, reversed the district court's ruling in *LULAC* by a 12-1 majority. By a 7-6 majority, the Fifth Circuit also overruled its prior decision in *Chisom v. Edwards*, 839 F.2d 1056, *cert. denied*, 488 U.S. 955 (1988), and held that the "results" test for vote dilution in §2 of the Voting Rights Act, as amended, does not apply to the election of judges, "for the cardinal reason that judges need not be elected at all." *LULAC v. Clements*, 914 F.2d 620, 622 (5th Cir. 1990). Four judges, in an opinion authored by Judge Patrick Higginbotham, adhered to the position taken by the panel that, while appellate judges are covered by § 2, trial judges are not. Judge Sam Johnson, the author of the original panel opinion in *Chisom*, dissented.

On November 21, 1990, the Houston Lawyers' Association, *et al.*, filed a petition for a writ of certiorari with this Court. The League of United Latin American Citizens, *et al.*, filed a petition for certiorari on December 14, 1990. Both petitions were granted and consolidated for review by this Court on January 18, 1991.

SUMMARY OF THE ARGUMENT

Section 2 of the Voting Rights Act covers *all* elections, including elections for judges. Congress neither expressly nor impliedly carved out an exemption from the Act for elected judges. So long as a state chooses to select its judiciary through popular election, it must conduct those elections in accordance with the Act's prohibition against minority vote dilution.

The *LULAC* concurrence's view that trial judge elections are exempt from §2 coverage is at odds with Congress' and this Court's instructions for determining liability under §2 of the Voting Rights Act. Both Congress and this Court have mandated

that courts reviewing claims under §2 engage in a local "fact-specific" appraisal of the result of the challenged structure on minority voting strength in the particular jurisdiction. A formalistic approach to assessing a vote dilution claim is expressly prohibited.

A fact-specific analysis necessarily precludes the creation of *per se* rules exempting particular elected offices from vote dilution claims and precludes courts from elevating any one particular factor to threshold or controlling status.

Furthermore, the state's interests in using particular electoral structures cannot pretermit a §2 analysis. Indeed, the state's interests in retaining particular features of a dilutive electoral structure are entitled to little weight at the liability stage of a §2 proceeding. At the remedy stage, however, the state's interests in maintaining particular non-dilutive features of a discriminatory election structure are properly weighed and accommodated. Remedial concerns are not an appropriate basis for denying §2 coverage as a threshold matter.

ARGUMENT

I. THE ELECTION OF JUDGES IS COVERED BY §2 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED.

Reversing its decision in *Chisom v. Edwards*, 839 F.2d 1056, *cert. denied*, 488 U.S. 955 (1988), that judicial elections are covered by §2 of the Voting Rights Act, the court below held that Congress, in amending the Act in 1982, sought expressly to exclude the election of judges. According to the majority, Congress' provision in §2(b) that the Act is violated when minority voters have less opportunity "to elect *representatives* of their choice," (emphasis added), is dispositive of Congress' intent to exclude elected judges from §2 coverage. In the majority's view, the use of the word "representatives" necessarily and deliberately excludes the election of judges.

The Brief of the Petitioners in *Chisom v. Roemer*, No. 90-757, (hereinafter "*Chisom* Brief at __"), documents in exhaustive detail Congress' intent to include *all* elected offices under the purview of the Voting Rights Act.

First, the *Chisom* petitioners' analysis demonstrates that the express language of the statute inclues the election of judges.

Chisom Brief at 17-29. In particular, §14(c)(1) of the Act defines "voting" under the Act as

> "*all* action necessary to make a vote effective in *any* primary, special or general election, including, but not limited to . . . casting a ballot and having such ballot counted properly *with respect to candidates for public or party office* and propositions for which votes are received in an election.

42 U.S. C. §1973*l*(c)(1) (emphasis added). Moreover, the co-terminous relationship between §2 and §5 of the Act further supports the proposition that elected judges are covered under §2. In the legislative history, Congress explicitly indicated that §2 and §5 must work in tandem. The Attorney General, the official responsible for interpreting and administering §5 of the Act, has consistently applied §5 to judicial elections. This court recently affirmed that §5 of the Act covers judicial elections. *State Board of Elections v. Brooks*, 111S.Ct. 288 (1990). *See also, Martin v. Haith*, 477 U.S. 901 (1986). *Chisom* Brief at 29-32.

In the legislative history of the Act, Congress clearly expressed its intention to include all elections, including the election of judges, when both enacting and amending the Act. Indeed, Congress was aware of the role played by the elected southern judiciary in furthering the establishiment of state-

sponsored racial discrimination and in undermining the full and effective enfranchisement of African Americans. *Chisom* Brief at 32-43.

Contrary to the Fifth Circuit's interpretation, the use of the word "representatives" in §2(b) of the 1982 amendments to the Act created neither an express nor an implied exemption from §2 scrutiny for elected judges. *Chisom* Brief at 41-42.

Finally, the fact that the one-person, one-vote rule does not apply to judicial districts is irrelevant to the application of the Voting Rights Act to the election of judges. *Chisom* Brief at 43-49.

The HLA petitioners incorporate by reference the analysis and arguments advanced by the Chisom petitioners in support of these points.

In the remainder of this brief, the HLA petitioners focus on an issue not expressly addressed by the petitioners in *Chisom* -- the application of the Voting Rights Act to trial judges. Although the arguments relating to the language and structure of the Act and its legislative history apply equally to all judicial elections, additional issues were raised in the Fifth Circuit's concurring opinion, authored by Judge Patrick Higginbotham, concerning coverage of trial judges under the Act, which we

discuss herein.

II. JUDGE HIGGINBOTHAM'S CONCURRENCE DOES NOT PROVIDE AN ALTERNATIVE BASIS FOR AFFIRMING THE DECISION OF THE COURT BELOW

The concurring opinion written by Judge Higginbotham and joined by Judges Politz, King, and Davis (and with respect to its analysis of § 2's applicability to trial judges, by Judge Wiener as well), acknowledges that the language, structure, and legislative history of the Voting Rights Act compel the conclusion that § 2 covers judicial elections. *See* Pet. App. at 51a-90a (Higginbotham, J., concurring). But it claims that Texas' scheme for electing judges is not subject to attack under § 2 because Texas has "structure[d] its government such that it wields judicial power at the trial level through trial judges acting separately, with a coterminous or linked electoral and jurisdictional base, each exercising the sum of judicial power at that level," Pet. App. at 91a (Higginbotham, J., concurring). The concurrence essentially maintains that the functional exclusion of African Americans from the electoral process of choosing Harris County's judges is

irrelevant as a matter of law.[20]

The concurrence is critically mistaken in four separate respects. First, it wrongly focuses on the post-election function of Texas trial judges rather than the fairness of the electoral process. Second, it improperly creates *per se* rules immunizing electoral practices from scrutiny under § 2. Third, it erroneously treats the state's purported interests in maintaining the present system as a threshold question of § 2 coverage, rather than as only one, relatively minor, aspect of the totality of the circumstances test mandated by Congress. Finally, it imports into the liability inquiry an issue more appropriately addressed at the remedy stage: the extent to which the full remedy required by § 2 can also accommodate the state's legitimate concerns. In light of these serious defects, the concurrence's analysis cannot serve as an alternative basis for affirming the judgment of the court of appeals.

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[20]Indeed, the concurrence never discusses *any* of the evidence regarding the racial dilution that results from the present system of electing trial judges in Harris County.

A. *The Concurrence's Focus on the Post-Election Functions Performed By Judges Is Fundamentally Misplaced*

The crux of the concurrence's argument focuses on how Texas trial judges act *after* the electoral process is over. Each judge, according to the concurrence, "acts alone" in deciding the cases assigned to him or her. Pet. App. at 104a (Higginbotham, J., concurring). The concurrence reasons backwards from this rather artificial view of the duties Texas trial judges perform *after* they have been elected to office[21] to conclude that "[t]here can be no dilution of votes for a single judge because each judge holds a complete judicial office." *Id.* at 93a.

The concurrence explains its conclusion by pointing out that "[s]ubdistricting [that is, electing Harris County' judges from smaller geographical districts within the county] would not create an equal opportunity for representation in decision-making. . . . What subdistricting does, rather than provide minorities with representation in all decisions, is to simply allocate judges, and thus judicial decisions, among various population groups." *Id.* at

[21]Trial judges in fact perform a number of functions jointly. They collectively elect various officials, such as the local administrative judge and the county auditor, Pet. App. at 149a (Johnson, J., dissenting), and they can even share in the adjudication of a single case, when different judges decide different preliminary matters, *Id.*

104a-105a. Thus, the concurrence continues, if Harris County's trial bench were to be elected from districts, minority litigants "have an 84.75% chance of appearing before a judge who has little direct political interest in being responsive to minority concerns." *Id.* at 107a. In short, the concurrence seems to be suggesting that African Americans are not really being injured by the present system because there is no alternative that would treat them any better.

That suggestion completely misses the point of this lawsuit. Petitioners' claim does not derive from their status as actual or potential *litigants* in Harris County's courts. Nor are they complaining about the results of judicial decisionmaking in any particular case. Rather, petitioners' claim stems from their status as registered *voters* who are seeking the right to participate equally in the process of electing judges. They are not seeking the opportunity to appear before judges politically beholden to them.[22] Thus, the decisionmaking process on which this Court

[22]Indeed, the concurrence's reasoning that Harris County's African American voters would be worse off under a districting scheme because they would have little chance either of appearing in front of a judge dependent on their political support or of having a judge "accountab[le] to minorities" deciding cases important to the African American community, Pet. App. at 107a, n. 13 (Higginbotham, J., concurring), is contrary to reason. Under the present system, of course, the African American community has *no* judges dependent on its support or accountable to it.

should focus is not *judicial* decisionmaking in individual cases, but *electoral* decisionmaking about who should sit on the bench.[23] Cf., *e.g.*, *Holland v. Illinois*, 110 S.Ct. 803, 812 (1990) (Kennedy, J., concurring) (explaining that a white defendant should be entitled to challenge the prosecution's use of its peremptory challenges to strike African American jurors, not because the defendant had been denied his rights as a litigant but because the potential jurors had been denied the right to participate equally in civic life).

That African Americans currently are shut out of Harris County's electoral process cannot be denied. Again and again, their preferred candidates have been defeated by white bloc voting. Regardless of whether African American litigants have an equal opportunity to have their cases heard in the courtroom, African American voters are entitled to an equal opportunity to have their voices heard in the voting booth. African Americans in Harris County are being denied this opportunity.

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[23]In some cases, elected officials' post-election functions may be relevant to a plaintiff's § 2 claim. If, for example, one of the elements of the plaintiffs' case was an allegation of unresponsiveness, *see* S. Rep. at 29 & n. 116, then the court might appropriately consider decisions rendered by the elected officials in the course of their duties.

In this case, petitioners did not raise the issue of the responsiveness of Harris County's elected judges to African American concerns. Accordingly, no inquiry into the court's post-election functioning is appropriate.

The concurrence concedes, as it must, that "[b]efore any suits are filed, before any cases are assigned, there is a group of judges with concurrent jurisdiction." Pet. App. at 102a (Higginbotham, J., concurring). Whatever singularity Harris County's judges possess, (which, as explained below, is a legally irrelevant event), it attaches only after they have taken office. The mere use of numbered posts in the election process no more turns judicial elections into elections for single-member offices than the use of numbered posts for legislative offices could turn those offices into single-member ones. *See* Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1, 18 (1991).

The bankruptcy of the concurrence's post-election function-driven analysis is powerfully illustrated by its complete inability to suggest a single way in which the day-to-day activities of judges would be affected by a change in the electoral system. Even if judges were selected by sub-districts they could obviously retain the power collectively to establish rules governing the "assignment, docketing, transfer, and hearing of all cases" within a county, Pet. App. at 97a (Higginbotham, J., concurring) (quoting Texas Gov't Code § 74.094(b)); obviously, each judge could also continue to preside over his or her assigned cases.

Moreover, as discussed fully below, sub-districting is only one of the remedial alternatives prayed for in the petitioners' complaint. Sub-districting should not function as a liability benchmark.

In sum, the fact that Harris County's 59 judges do not act in constant collaboration with one another is irrelevant to the central question of this case: whether Harris County can elect those judges in a way that denies its African American citizens the ability to participate effectively in the electoral process.

B. *Section 2 Forbids the Creation of Per Se Rules Exempting Voting Practices from Scrutiny Under the Totality of the Circumstances Test*

There is irony in the concurrence's fixation on the "function" performed by Texas trial judges after they are elected. *E.g.*, Pet. App. at 102a (Higginbotham, J., concurring). While the concurrence spends a great deal of time talking about post-election judicial functions, it completely ignores Congress' directive to take a "functional" view of the political process in asking whether minority votes enjoy an equal opportunity to participate and elect their chosen candidates. S. Rep. at 30 n. 120; *see Gingles*, 478 U.S. at 45.

The concurrence claims that, as a matter of law, § 2 can

not reach a challenge to the methods used to elect trial judges. "There can be no dilution of votes," it asserts, in situations in which officials are elected to fill separate offices. Pet. App. at 93a (Higginbotham, J., concurring). Moreover, it suggests multimember electoral districts are not subject to challenge when a state links "jurisdiction and elective base." *Id.* at 112a. The underpinnings of the concurrence's analysis are fatally flawed.

1. *Congress Expressly Disapproved of the Use of Per Se Rules in § 2 Cases*

Section 2 expressly provides that courts faced with challenges to electoral practices examine "the totality of circumstances," 42 U.S.C. § 1973(b), to determine whether minority voters have an effective opportunity to participate in the political process and to elect their preferred candidates. Congress rejected any "formalistic" approach, in favor of a "functional" one. S. Rep. at 30 n. 120. As this Court explained in *Gingles*, both the language and legislative history of amended § 2 require the trial court

> to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters. This determination is peculiarly dependent upon the facts of each case, and requires an intensely local appraisal of the design and

impact of the contested electoral mechanisms.

478 U.S. at 79 (internal quotation marks and citations omitted). The Senate Report's "flexible, fact-intensive test for § 2 violations," *id.* at 46, is completely antithetical to the rigid, juridically derived, theory-driven rules advanced by the concurrence in this case.

Just as "electoral devices. . . may not be considered *per se* violative of § 2," *Gingles*, 478 U.S. at 46, so, too, they cannot be considered *per se* lawful, without any consideration of the way in which they effectively freeze African Americans out of the electoral process. Indeed, to suggest that any one factor standing alone can dispose of a § 2 claim would advance precisely the kind of "mechanical" analysis that was expressly rejected in the Senate Report. S. Rep. at 29 n. 118.

The categorical, formalistic nature of the concurrence's approach is evident from its failure to mention a single factor identified as relevant to a §2 inquiry by either the statute or the Senate Report. The concurrence never touches upon the virtual exclusion of African Americans from the Harris County judiciary -- a consideration expressly identified in the statute, 42 U.S.C. § 1973(b), highlighted in the Senate Report, S. Rep. at 30, and deemed "most important" by this Court, *Gingles*, 478 U.S. at 48

n. 15. It never acknowledges the pervasive and profound racial bloc voting in Harris County judicial elections that essentially renders African American votes worthless. In short, it completely ignores "past and present reality," *Gingles*, 478 U.S. at 79; S. Rep. at 30, in favor of judicial policymaking.

2. *The Particular Per Se Exemptions Proposed by the Concurrence Are Especially Meritless*

The concurrence identifies two structural features that it asserts should exempt Texas' scheme for electing trial judges from scrutiny under §2. First, it claims that each trial judge occupies a "single-member office," and thus, no claim of vote dilution can be advanced. Pet. App. at 100a (Higginbotham, J., concurring) (relying on *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986)). Second, it claims that when a state chooses to make an office's jurisdictional base coterminous with its electoral base, no §2 challenge can be brought. Pet. App. at 112a-114a (Higginbotham, J., concurring).

It is important to face the potential breadth of the concurrence's *per se* rules. Section 2 prohibits electoral practices enacted or maintained for discriminatory purposes, as well as those which happen to result in the denial of an equal opportunity

for minorities to participate and to elect their preferred candidates. S. Rep. at 27. If the concurrence's analysis is right, then a state's decision to set up its trial bench in a particular manner specifically to ensure that African Americans have no say in the process of electing judges would be immunized from attack under § 2. Similarly, if Texas had decided to use at-large elections rather than elections from sub-districts precisely *because* this would prevent African Americans from electing any judges, that, too, would be immunized.

But that simply cannot be the law. Such attempts to abridge the voting rights of African Americans would surely violate the Fourteenth and Fifteenth Amendments. If that is the case, then they must violate § 2 as well. Neither structural feature identified by the concurrence can ultimately support the creation of a sweeping exemption from § 2.

a. *The Concurrence Improperly Invoked the So-Called "Single-Member Office Exception"*

The concurrence's assertion of a single-member office exception to §2 is completely meritless. First, as this Court noted, §2 prohibits states from imposing "*any* standards, practices, or procedures which result in the denial or abridgement

of the right to vote," *Gingles*, 478 U.S. at 43 (emphasis in original); *see* 42 U.S.C. § 1973(a), without regard to the office to which those mechanisms apply. Moreover, this Court has expressly held that §5 of the Voting Rights Act covers single-member offices. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), one of the challenged laws involved changes in the method for selecting the county school superintendent in several Mississippi counties. The Court recognized that a change in the method of electing that single official might dilute the voting strength of a county's citizens. *See also, e.g., City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987) (holding that plaintiffs could challenge the system used to elect the single county commissioner), *cert. denied*, 485 U.S. 936 (1988); *Buchanan v. City of Jackson*, 683 F. Supp. 1537, 1542 (W.D. Tenn. 1988) (finding liability in at-large election of three city commissioners, each of whom ran for a numbered post as the single official responsible for education, public works, or public safety); *Dillard v. Crenshaw County*, 649 F. Supp. 289 (M.D. Ala. 1986), *aff'd in part and remanded*, 831 F.2d 246 (11th Cir. 1987), *on remand*, 679 F. Supp. 1546 (M.D. Ala. 1988) (rejecting the adoption of a form of government containing a single-person office as violative of §2). In short, § 2 contains no

"single-member office exception."

But even to the extent that certain vote dilution claims cannot be remedied by sub-districting (for example, where there is only one position in a particular jurisdiction), that limitation is unavailing in this case. To suggest that each judge in Harris County occupies a "single-member office" completely distorts any reasonable meaning of that phrase. When the cases upon which the concurrence relies discussed the applicability of § 2 to single-member offices, they were referring to offices that were unique within their respective jurisdictions. There was only one mayor, one city council president, and one comptroller in New York City, *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986);[24] there was only one mayor in Port Arthur, Texas, *City of Port Arthur v. United States*, 459 U.S. 159 (1982);[25] and there was only one probate judge in Dallas

[24]Moreover, *Butts* cannot be read to stand for the proposition that offices are exempted from §2 if they do not involve collegial decisionmaking. *See* Pet. App. at 100a (Higginbotham, J., concurring). In fact, a significant portion of the function performed by the three offices in *Butts* was collegial: their occupants sat on the New York City Board of Estimate, the multimember body responsible for conducting a significant part of the city's business. *See Board of Estimate v. Morris*, 109 S.Ct. 1433 (1989).

[25]*Port Arthur* is especially inapposite to this case, as it did not involve § 2 at all (it was a § 5 case, and this Court has already held that § 5 covers trial judges, *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986); *State Board of Elections v. Brooks*, 112 L.Ed. 2d 243 (1990)), and no one had challenged any aspect of the

County, Alabama, *United States v. Dallas County*, 850 F.2d 1430 (11th Cir. 1988). If Harris County had only one trial judge, petitioners would be hard-pressed to challenge the *at-large feature* of his or her election.[26] But Harris County has 59 judges. Texas' decision to use numbered posts and its rules governing judicial duties simply do not transform the 59 technically fungible judges into 59 discrete offices. *See* Pet. App. at 155a-160a (Johnson, J., dissenting); *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 518 (M.D. Ala. 1989); Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1, 18-19 (1991).

b. *The Concurrence's Reliance on the Congruence of Electoral and Jurisdiction Bases Is Misplaced*

The second *per se* rule advanced by the concurrence rests on its belief that when an official's "elective base and jurisdiction" are linked, § 2 cannot be used to uncouple the two by requiring

procedure for electing the city's mayor.

[26]However, petitioners would still have standing to challenge other electoral features of such a system such as its winner-take-all majority vote requirement. *See supra* at nn. 9 and 17.

the disaggregation of multimember districts.[27] *Pet. App. at 105a* (Higginbotham, J., concurring).

As an initial matter, it is important to realize that in *every* at-large election system a coterminous electoral and jurisdictional base exists. When a city council, for example, is elected at-large, each council member's elective base is the entire city, and she is expected to represent the interests of the entire city. Indeed, the linkage of elective base and post-election responsibility is precisely the justification for at-large elections. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 70 (1980) (plurality opinion); *id.* at 82 (Blackmun, J., concurring in the result); *1982 Hearings* at 1310 (testimony of Henry Abraham); *id.* at 1358-59 (statement of James Blumstein). Yet, Congress made it crystal clear in 1982 that at-large elections are not *per se* immune from attack. Indeed, § 2 was amended expressly to repudiate this Court's analysis in *Bolden* and to make explicit the statutory basis for challenging at-large elections. S. Rep. at 15-16 & 27.

If anything, it is *less* necessary to link elective and jurisdictional bases for judges than for other elected officials. Judges, unlike members of state legislatures, city councils, boards

[27] Again, the concurrence presumes that sub-districting is the only remedial alternative, which is not the case here. *See infra* at 56-60.

of education, or other local commissions, are not permitted to be partisan champions of the electorate that selected them. Judges would violate their oath of office if they were to decide cases in favor of litigants from the county that elected them. Since judges do not represent their constituents in the sense of adopting popular preferences as decisions in individual cases, it is *less* important that a judge's jurisdiction cover only those persons who elected him or her than it is, for example, that a city council member's jurisdiction cover only persons in his or her electorate. *Cf. Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (upholding an Alabama statute giving city's police jurisdiction over unincorporated communities within a few miles of their boundaries).

At bottom, the concurrence's linkage argument is entirely dependent on its analysis of the state's purportedly distinctive interests in structuring elections for its judicial system in a fashion that clearly would be subject to invalidation under § 2 if it applied to elections for any other office. As discussed fully below, Texas' history and present system of electing its judges shows a consistent state interest in treating judicial elections like all other elections. In addition, under §2, the state's interests in particular electoral features do not pretermit an analysis of the totality of

relevant circumstances, but are simply one factor among many to be considered at the liability stage. Here, the state failed to identify any interests that outweigh African American voters' interests in a racially fair electoral system. The concurrence has improperly injected interests appropriately considered only at the remedy phase into its assessment of liability.

C. *Texas Treats the Election of District Judges Like All Other Elections*

In every respect, Texas treats judicial elections like elections for non-judicial offices. Although Texas has been required to comply with both § 5 of the Voting Rights Act, *see supra* at 13 and n. 15, and § 2 of the Act for non-judicial elections, *see e.g.*, *White v. Regester*, 412 U.S. 755 (1973); *Jones v. Lubbock*, 727 F.2d 364 (5th Cir. 1984); *LULAC v. Midland ISD*, 812 F.2d 1494 (5th Cir. 1987), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989), Texas now seeks to exempt judicial elections from

coverage under § 2.[28] But because Texas historically has treated *all* elections the same, it may not exclude judicial elections from the obligations imposed by §2 by mere fiat.

The decision to elect judges by popular election is controlled by individual state policy. The Constitution reserves to states great latitude in choosing a method of selecting judges. States may appoint judges without offending the Constitution.[29] *Holhouser v. Scott*, 335 F.Supp. 928, 930-932, (M D.N.C. 1971) (republican form of government does not require election of state court judges), *summarily aff'd.*, 409 U.S. 807 (1972).

Originally, most states provided for the appointment of judges, but by the middle of the 1800s, there was growing public pressure led by Andrew Jackson's criticism of an unelected judiciary, to make judges more representative of the public by "subject[ing judges] to direct, periodic popular review in elections." D. Adamany, P. Dubois, "Electing State Judges," 1976 Wisconsin Law Review 731, 769 (1976). Beginning with New York in 1846, by the outbreak of the Civil War, 22 states

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[28]Texas recently sought preclearance under § 5 for the addition of district judgeships. *See supra* at n. 15.

[29]A shift from an elective to an appointive system could, however, violate the Voting Rights Act. *See* House Report No. 97-227, 97th Cong., 1st Sess., at p.18 (1982) (hereinafter "House Report at __").

had adopted the partisan election system for judges. Hill, "Taking Texas Judges Out of Politics: An Argument for Merit Selection." 40 Baylor L. R. 339, 346 (1989). Texas adopted an elective system in 1850.

As historian James Hurst has noted, the move to select judges by popular election rather than by appointment was a "highly self-conscious choice of policy." J. Hurst, *The Growth of American Law* 140 (1950). Proponents of an elected judiciary argued that while judicial independence was a goal shared by all, it was simultaneously necessary to ensure that state judges were aware that they were responsible to all of the people of the state. Hall, "The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860," 45 Historian 337, 348 (May 1983).

Texas, in particular, has demonstrated a strong policy in favor of public participation in the selection of judicial candidates. Despite repeated attempts in the legislature to re-introduce an appointive system of selecting judges since the creation of its Constitution in 1876, Texas has consistently refused to adopt even

a limited appointive system for the selection of judges.[30] *See* Hill at 354; Champagne, "The Selection and Retention of Judges in Texas," 40 Southwestern L.J. 53, 57 (1986).

Judicial elections operate just like other Texas elections. Primary and general elections for judges are held at the same time as elections for state legislators and municipal officers. Judicial candidates are bound by the same election rules and regulations as non-judicial candidates. Candidates running for district judge, for example, are required to pay to the Democratic or Republican party a filing fee comparable to that required from legislative candidates. *See* Tex. Elec. Code §172.024.

Like elections for non-judicial officers, judicial elections in Texas are partisan. In the case at hand, for example witnesses

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[30]As argued by the *Chisom* petitioners, and incorporated herein by reference, *see Chisom* Brief at 51-56, this state policy decision to select judges by popular election carries with it the responsibility to conduct those elections in accordance with the Constitution and federal law. Just as Texas could not require a literacy test as a prerequisite to voting, Texas cannot avoid the other conditions imposed on elections by the federal government. This Court has cautioned that "Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government." *Smith v. Allwright*, 321 U.S. 649, 657 (1944).

This Court has also specifically cautioned against treating the state judiciary as "a mystical entity" and state judges "as anointed priests set apart from the community." *Landmark Communications v. Commonwealth of Virginia*, 435 U.S. 829, 842 (1978) (quoting, *Bridges v. California*, 314 U.S. 252, 291 (1941) (Frankfurter, J., dissenting).

testified that incumbent Democratic judges in Harris County campaigned and raised funds together, and posed for a picture to be used in a mass mailing that encouraged voters to re-elect the Democratic slate of judges. *See e.g.*, TR. at 3-211.[31]

In addition, trial judge districts tend to be coterminous with the districts from which non-judicial officers are elected. As one Texas commentator has observed, "the demographics and design of [trial court] judicial districts bear striking similarity to districting plans which have been judicially overturned at every level of government, from school boards to Congressional districts" in the state. Johnson, "Simple Justice," Background Report to House Committee on the Judiciary, Texas House of Representatives (November 1990).

Since Texas treats its trial judge elections no differently than any other elections, elections for trial judges are entitled to

[31]Texas' judicial elections often receive more nationwide attention for their competitiveness, and the sometimes astronomical sums of money contributed to judicial campaigns, than elections for legislative and other non-judicial offices. *See* Woodbury, "Is Texas Justice for Sale?," *Time*, January 11, 1988 at 74; "'60 Minutes' Examines Controversy Over Donations to Judges," *Houston Post*, Dec. 7, 1987, at 2A, col. 1. Campaign contributions, not the qualifications of the candidates, often play a significant role in the outcome of judicial elections in Texas. Hill, at 341 ("The role of large contributors to judicial campaigns is critical since there is a high correlation between campaign contributions and electoral success.")

no special judicially-created exemption from §2. Indeed, in the 1982 legislative history to §2, specific reference was made to the very Texas district court judgeships at issue in this case. Moreover, nearly every reference to judicial districts in the legislative history of the Act refers to trial judge districts. *See Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. at 38, 937, 1188 (1981).

D. *A State's Interest in Particular Electoral Features Cannot Insulate Those Features from §2 Review*

The state and the concurrence argue that even though the result of maintaining the current method of electing district judges virtually excludes African Americans from an equal opportunity to elect their candidates of choice as district judges, the state's interests in maintaining the at-large system pretermit a liability finding under §2.

As a matter of law, this interpretation of the Act's application and the role of the state's interest in determining liability under §2 is fundamentally at odds with Congress' judgment. Congress has expressly *rejected* the notion that state's

interests in particular electoral structures may be elevated above the right of minority voters to full and effective enfranchisement. In enacting the Voting Rights Act, Congress articulated a national policy placing minority voters' rights before political tradition and state policy. *See* S. Rep. at 5 (statute enacted to "create a set of mechanisms for dealing with continued voting discrimination . . . comprehensively and finally.") Thus, the state's interest in an educated electorate, for example, *see Lassiter v. Northampton*, 360 U.S. 45 (1959), no longer justifies the maintenance of a literacy test as a prerequisite to voting.[32] *Oregon v. Mitchell*, 400 U.S. 112 (1970)(upholding 1970 amendments to the Voting Rights Act suspending the use of literacy tests nationwide). Similarly, a state's policy favoring at-large elections cannot justify their maintenance if that structure dilutes minority voting strength.[33] Congress has exercised its political judgment and decided that states' interests must yield to the Congress' interest in eradicating

[32]The state's interest in administrative convenience also cannot outweigh minority voters' rights to be free from restrictive registration practices. *PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987)

[33]This is especially true where, as here, the trial record does not support, or even mention, most of the interests that concern the concurrence.

racial discrimination in voting.[34] The Fifth Circuit cannot re-evaluate Congress' decision to give primacy to the interests of minority voters, and substitute its own judgment about the proper weight to be afforded the state's interests.[35]

In setting out the standards for assessing claims under amended §2 of the Act, Congress did not invite courts to use the state's interests to trump the plaintiffs' right to participate in an electoral and political process free from racial discrimination. Indeed, Congress suggests exactly the converse. Proof that the state's policy underlying a challenged electoral practice or system is tenuous may have probative value "*as part of the plaintiffs' evidence*" in establishing a violation under amended §2. S. Rep at 29 (emphasis added). Congress does not provide that the state may assert the non-tenuousness of the policy underlying the use of a challenged electoral structure as an affirmative defense to a vote dilution claim, as Texas attempts in the case at hand. *See e.g.*,

[34]Although in *Gingles* the State of North Carolina similarly argued that its interests were served by the use of multi-member districts in that state, this Court notwithstanding unanimously affirmed the district court's finding that those interests did not outweigh the plaintiffs' showing of vote dilution. *Thornburg v. Gingles*, Brief of Appellants at 3 (1985).

[35]In any case, it is a well-established principle that state policies are only to be honored by courts only to the extent that they do not undermine rights guaranteed under the Constitution and federal statutes. *White v. Weiser*, 412 U.S. 783, 795-797 (1973); *Smith v. Allwright*, 321 U.S. at 657.

S. Rep. at 195 (additional views of Sen. Robert Dole, the architect of §2(b)) (amended §2 rejects composite standard in which defendants may rebut a showing of discriminatory results by showing non-discriminatory state interest behind challenged practice). To elevate, as the concurrence does, the interests of the state in maintaining particular, albeit discriminatory, electoral features to a threshold coverage question simply re-introduces the intent standard, which Congress expressly repudiated when it amended §2.

Moreover, the state's articulation of *even important* non-racial interests in maintaining a particular election structure is of little probative value under the amended Act.[36] Thus, "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." *United States v. Marengo County Commission*, 731 F.2d 1546, 1571 (11th Cir.)(quoting Senate Report at 29 n.117), *cert. denied*, 469 U.S. 976 (1984). The state's interests are but *one factor* which may be considered in the "totality of

[36] "Benign explanations may be offered for why these methods have been selected, but the results [are] telling: minorities remain severely underrepresented in county[wide]" judicial office. House Report at 20; *see also*, S. Rep. at 195.

circumstances," and, in fact, are not among the factors identified by this Court or by Congress in the Senate Report as the most important. *Gingles*, 478 U.S. at 45 n.15 (identifying the extent of minority electoral success and the existence of racially polarized voting as the most important and relevant factors).

E. *The District Court Properly Found that the Interests Advanced by the State Are Not Compelling*

At trial, the state articulated its interest in equalizing the judicial dockets and maintaining judicial independence as a basis for perpetuating the use of countywide electoral districts for district judges. The *LULAC* concurrence raised an additional concern that litigants, under a sub-county election scheme, would appear before judges over whom they have no electoral control. Pet. App. at 107a-108a. This issue was also raised on appeal by the state. None of these interests, however, were supported by evidence in the record. Moreover, Texas' current electoral practices do not support the concerns raised by the state at trial, as discussed below. Accordingly, the district court, based on the evidence in the record, found that the state's proferred interests in maintaining the at-large method of electing district judges were not "compelling." Pet. App. at 283a. Instead, the district court

was persuaded that the state's articulated interests could be accommodated "under a single member scheme or . . . other [alternative electoral] scheme." *Id.* at 284a.

The Fifth Circuit, in reviewing the district court's findings, improperly substituted its own interpretation of the evidence presented, completely ignoring the clearly erroneous standard of Rule 52(a). *Gingles*, 478 U.S. at 78. With regard to §2 vote dilution claims, in particular, this court has specifically instructed reviewing courts to afford great deference to the factual findings of the trial court judge who is better acquainted with the "indigenous political reality." 478 U.S. at 79-80. In *LULAC*, the trial court's findings as to the state's articulated interests were amply supported by the record.

First, the state's claim that the 1985 amendment to the Texas Constitution requiring that electoral districts for judges consist of whole or multi-counties was enacted in furtherance of a broader state judicial reform effort to equalize the dockets of judges is entirely unsupported by *any* facts or testimony in the record. *See* Testimony of defendant Chief Justice Thomas Phillips, TR. at 5-78. Chief Justice Phillips was unable to explain how the countywide election requirement furthered the state's

asserted interest in equalizing the dockets.[37] *Id.*

Similarly, nothing in the record supported the state's concern that judges elected from sub-county districts would be vulnerable to improper pressures from special interests and organized crime. To the contrary, one defendant-intervenor testified that he knew of no instances in which the independence of Texas' Justices of the Peace, who are elected from sub-districts, has been questioned. TR. at 4-90.

Moreover, the state's assertion that elections from sub-county districts will undermine the independence of district judges is belied by the existence of at least 61 district courts in Texas, elected from countywide or multi-county districts with populations of 50,000 or less. If Harris County, with a population of 2.8 million were divided into 59 equally populous judicial sub-districts, for example, each district would have a population of approximately 47,000 residents. Evidently, Texas currently elects judges from districts with comparable, and in some counties

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[37]The state's articulated interest in equalizing the court's dockets is not supported, in fact, by a review of the court dockets in varying counties. In 1988, for example, more cases were docketed and reviewed by the courts in Dallas, Bexar and Travis counties, than in Harris County, yet Harris County is assigned more district judges (59) than any other judicial district in the state. Johnson, "Simple Justice," Background Report of the Committee on the Judiciary, Texas State House of Representatives (November 1990).

smaller, populations than the population contemplated in the hypothetical 59 sub-district remedy for Harris County that was objected to by the concurrence.[38] No one has ever suggested that the judges currently serving in the 61 counties referred to above or the state's Justices of the Peace are biased decision-makers, influenced by organized crime. In light of the complete absence of any evidence in the record to support this asserted interest, the state cannot legitimately assert that sub-districts created to cure racial vote dilution in Harris County would produce such sinister results.[39]

The concurrence also relies on the state's purported interest in maintaining a link between the electoral and jurisdictional base for district judges. In addition to its previously

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[38]Other states, undoubtedly also concerned with maintaining a fair and independent judicary, elect judges with citywide or countywide jurisdiction from sub-districts, and this process has been upheld. *See e.g.*, *Holhouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971) (upholding statute permitting judges with statewide jurisdiction to be elected from districts; also upholding transfer of district judges from one district to another for temporary or specialized duty); *Cox v. Katz*, 294 N.Y.S. 2d 544 (1968) (upholding constitutionality of electing judges with citywide jurisdiction from districts within each borough).

[39]Implicit in the state and the concurrence's asserted concern is an assumption that African American judges elected from sub-districts would be more susceptible to special interest influence than the white judges who currently serve in districts virtually equally in size to the hypothetical majority African American sub-districts. There is nothing in the record to suggest that African American judges would be less likely to uphold the judicial oath of fairness and impartiality than currently sitting white judges in small counties.

discussed legal flaws, *see supra*, at 37-40, this analysis is also factually unfounded. District judges in Texas do not, in fact, have a coterminous electoral/jurisdictional base because Texas district judges have statewide jurisdiction and may hear cases anywhere in the state. *See Nipper v. U-Haul*, 516 S.W.2d 467 (Tex. Civ. App. 1974); *Reed v. State of Texas*, 500 S.W.2d 137 (Tex. Crim. App. 1973). Thus, if the concurrence's interpretation is correct, Texas currently violates the rights of litigants who appear before out-of-county judges.[40]

Indeed, the reality of judicial administration in Texas is at odds with the state and the concurrence's view that litigants have a right to have their cases adjudicated by judges over whom they have electoral control. Judges in Texas, in fact, often sit in counties from which they were not elected in order to assist with docket control. TR. at 5-120. Litigants in Texas, therefore, frequently appear before judges over whom they have no electoral control. In addition, under the current system, cases are assigned to judges "at random," and may be freely transferred between

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[40]The dissent addresses this argument in detail at Pet. App. at 169a-174a. In any case, if Texas views this interest as important then it may accommodate that interest by proferring a remedial plan than preserves the protections currently offered by its venue rules. Texas is also free, of course, to adopt new venue rules to protect its interests once a remedial plan is adopted. These options are to be explored, however, at the remedial stage of §2 litigation. *See infra*, at 56-61.

judges. Litigants, therefore, have no expectation, of appearing before any particular judge. TR. at 2-55.

The state's purported policy in favor of countywide electoral jurisdictions for judges is most significantly undermined by the state's own law which permits the election of judges from sub-county districts. Art. 5, §7(a)(i), Texas Constitution of 1876, as amended.[41]

In short, Texas' asserted interests in the maintenance of the current judicial election method were properly weighed by the district court. Against these unsupported interests, the district court weighed the overwhelming evidence in the record that African American voters are prevented under the current election system from electing their candidates of choice as district judges.

Among the most compelling evidence relied upon by the district court were the racially polarized voting analyses of both parties' experts. They showed that white voters and African

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[41]The state's most clearly articulated policy is one which favors the involvement of the voters in the selection of the state's judges. As discussed above, Texas has maintained and reaffirmed this policy repeatedly during the past 124 years. The current system, which demonstrably excludes minority voters from the state's judicial electoral process in Texas' most populous counties, itself runs counter to Texas' interest in public selection of the judiciary. Having delegated to voters the right to elect all of the state's judges, Texas' policy would be served better by the inclusion of *all* of the voters -- including minority voters -- in the judicial election process.

American voters in Harris County voted differently in *every* election in which a white candidate faced an African American opponent. African American voters consistently gave 97% of their votes to African American candidates, while whites *never* gave even a bare majority of their votes to an African American candidate. Even within the same political party, there was a 40% disparity in the success rates of African American and white district judge candidates in general elections. TR. at 3-134-135.

The virtual refusal of white voters in Harris County to elect African American judicial candidates was most boldly evidenced by the 1986 the re-election bid of 19 incumbent Democratic judges, in which all of the 16 white Democrats won, while all three African American Democratic incumbent judges lost. The record showed that as a result of the dilution of African American votes, only 2 African Americans were elected as district judges between 1980 and 1988. The full weight of the evidence in the record leads to the inescapable conclusion that racial vote dilution exists in Harris County district judge elections.

The district court properly found that in the context of the political reality in Harris County, the state's unsubstantiated interests were not compelling.

F. *Section 2 Provides States with the Opportunity at the Remedy Stage to Devise Election Methods that Protect their Legitimate Interests*

Although the state's interests in perpetuating the use of a dilutive electoral scheme cannot be afforded controlling or even significant weight in determining liability under §2, the Act provides for the protection of the state's legitimate interest in retaining the non-dilutive features of such an electoral scheme. These interests are properly accommodated at the remedy phase of the litigation.

At the remedy stage, the state is afforded the *first* opportunity to fashion an alternative election plan[42] that remedies the proven violation and serves the state's bona fide interests.

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[42]Despite the concurrence's attempt to analyze the apprpriateness of a sub-district remedy for the election of district judges in Harris County, no remedies, save the interim remedy ordered by the district court, were offered by either party, in the case at hand. The illustrative maps offered by the plaintiffs at trial were *not* proposed remedial plans. Those demonstrative exhibits were offered for the limited purpose of illustrating the causal nexus between the challenged election scheme and the dilution of minority voting strength, in accordance with this Court's direction in *Gingles*. 478 U.S. at 45. Plaintiffs may use other methods to illustrate the effect of the challenged election scheme on minority voting.

In *Gingles*, the illustrative map exhibited by the plaintiffs at trial was not the remedial plan ultimately approved by the district court. In fact, in that case, the court ultimately adopted the plan submitted by the state, over the plaintiffs' objections, as the remedy. *See Gingles v. Edmisten*, 590 F.Supp. at 381. Thus, the plaintiffs' demonstrative exhibits provide a limited basis, at best, upon which a court can determine effectively the appropriateness of a sub-district remedy. Certainly denying liability based on objections to the hypothetical sub-district maps offered at trial is utterly unfounded.

McDaniel v. Sanchez, 452 U.S. 130, 150 n. 30 (1981). The state also may object to elements in a plaintiff's proposed plan which undermine those interests. In reviewing proposed remedial plans, the court is required to defer to the state's proferred plan, so long as it completely cures the violation "and is not itself vulnerable to legal challenge." *White v. Weiser*, 412 U.S. 783, 797 (1973).

In the instant case, both Texas and the concurrence advanced interests that they claim will be undermined by the use of electoral sub-districts, which they assume is the only available remedy in this case. Sub-districts, however, are not the only remedy available to cure the vote dilution proven by African American voters in Harris County.[43]

Indeed, the HLA petitioners specifically alleged in their complaint in intervention that "the use of a *non-exclusionary at-large* voting system could afford African Americans an opportunity to elect judicial candidates of their choice." J.A. at 20a. The HLA petitioners identified at-large limited and cumulative voting, in particular, as election methods that would

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[43]However, the use of electoral sub-districts for judges with countywide jurisdictions has also been approved as a remedy under the Voting Rights Act. *See e.g., Martin v. Mabus*, 700 F.Supp. 327, 332 (S.D.Miss. 1988) (approving remedial plan adopting sub-districts for election of chancery, circuit and county court judges).

give African Americans a more equal voice in the election of district judges. Both limited and cumulative voting remedies preserve the countywide nature of the district judge election scheme, but undercut the racially exclusionary "winner-take-all" quality of the at-large structure that denies minority voters in Harris County the opportunity to elect their candidates of choice to judicial office.[44]

These potential remedies, which the petitioners and the district judge anticipated would be explored at the remedial stage, *see* Pet. App. at 303a (court will entertain motions to enjoin future elections "pending the Remedy Phase of this litigation"), address many of the concerns raised by the state and the concurrence with regard to the appropriateness of a sub-district remedy for trial judge elections.

If the parties had been permitted to proceed to the remedy phase of the litigation, the petitioners were prepared to entertain a claim by the state that the use of limited and cumulative voting

[44]In a limited voting election scheme, for example, each voter is limited to voting for less than full slate of candidates. A cumulative voting scheme, on the other hand, permits each voter to aggregate as many votes as there are seats to be filled to cast for their preferred candidate. In both electoral schemes, the at-large feature of the election scheme is maintained. *See* Karlan, "Maps and Misreadings" at 223-236. These modified at-large systems provide a realistic alternative to sub-districting to cure a proven §2 violation.

would be an acceptable remedy to cure the proven violation in this case. As both remedies provide electoral opportunities for minority voters without relying on geographic sub-districting, the coterminous electoral/jurisdictional base for Texas district judges that the concurrence deems vital to the function of trial judges, could be retained. These remedies are acceptable under the Act, so long as they fully remedy the prior dilution.[45] S. Rep. at 31. *See e.g., Dillard v. Chilton County Bd. of Educ.*, 699 F.Supp. 870 (M.D. Ala. 1988), *summarily aff'd*, 868 F.2d. 1274 (11th Cir. 1989) (adopting magistrate's recommendation that cumulative voting be used for election of county commission and school board); *Dillard v. Town of Cuba*, 708 F.Supp. 1244 (M.D. Ala. 1988) (limited voting scheme acceptable under §2 for city council elections). The use of these voting systems has been upheld for a broad array of elected offices, including trial judges. *See e.g.*, *Orloski v. Davis*, 564 F.Supp. 526 (M.D. Pa. 1983) (upholding use of limited voting scheme to elect Pennysylvania Commonwealth Court); *Cintron v. Romero-Barcelo*, 671 F.2d 1,

[45]One expert has already concluded that "[l]imited voting is a viable remedial system" for the election of district judges in Harris County. Issacharoff, "The Texas Judiciary and the Voting Rights Act: Background and Options," December 4, 1989 at 18, attached as Appendix "B" to HLA-intervenors Supplemental Brief on Rehearing En Banc.

6 (1st Cir. 1982) (holding that limited voting scheme for election of Commonwealth representative is "reasonable" and facilitates minority representation); *Hechinger v. Martin*, 411 F.Supp. 650 (D.D.C. 1976) (three-judge court) (upholding limited voting scheme for District of Columbia city council elections) *aff'd per curiam*, 429 U.S. 1030 (1977).

The availability of these remedial alternatives undermines the very basis upon which the concurrence denies the plaintiffs' relief in Texas: that a sub-districting remedy would undermine Texas' purported interest in preserving the countywide election system for trial judges.[46] More importantly, the availability of remedies which do not involve sub-districting demonstrates the danger of the concurrence's premature consideration of remedial issues.

Had the concurrence applied the correct legal standard in this case, it would have been obliged to affirm the district court's factual findings as not clearly erroneous. Instead, it elevates its speculative musings about several hypothetical state interests to pretermit the totality of circumstances analysis of

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[46]A discussion of these electoral alternatives and their relevance to this case was briefed and argued by the HLA petitioners before both the panel and the *en banc* court. Judge Higginbotham's extensive panel opinion and concurrence, however, fail to address this critical issue.

liability, treating the case as an opportunity for creative judicial construction both of the relevant statute as well as the relevant facts.

The concurrence's misguided analysis obscures the most important issue in the case at hand: African Americans are effectively shut out from meaningful participation in the election of district judges in Harris County. Despite the many theoretical and policy-oriented issues raised and discussed by the Fifth Circuit in *LULAC*, this factual reality -- the exclusion of minorities from the judicial electoral process -- is never addressed. The ability of minority voters to participate in the political process, however, is the federally protected interest at the core of this case.

As "the major statutory prohibition of all voting rights discrimination," S. Rep. at 30, Congress intended the Voting Rights Act to eliminate racial discrimination in voting "not step by step, but *comprehensively* and *finally*." *Id.* at 5 (emphasis added). As part of this goal, Congress intended to enfranchise meaningfully African Americans citizens in all elections, including those for trial judges.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand this case for a determination of the appropriate remedy.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether Congress included district judges within Section 2(b) of the Voting Rights Act when it extended Section 2 to add a results test for vote dilution?

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Nos. 90-813 and 90-974

In the Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASS'N, *et al.*, and
LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
PETITIONERS,

v.

THE ATTORNEY GENERAL OF TEXAS and
JUDGE F. HAROLD ENTZ, *et al.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT
JUDGE F. HAROLD ENTZ

STATUTE INVOLVED

Section 2 of the Voting Rights Act, as amended, provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1988) (emphasis in original).

STATEMENT OF FACTS

Respondent Judge Entz is a sitting criminal district judge in Dallas County, Texas. He intervened as a defendant partly to present an independent factual defense of Dallas County.[1] Although this case was resolved below on legal issues largely independent of the facts, Petitioners have presented such a misleading view of the facts as they pertain to Dallas that Judge Entz must respond.

Dallas County is a large metropolitan area encompassing the seventh largest city in the U.S. (Dallas), and several medium-sized cities (Garland, Irving, Mesquite,

[1]Judge Entz also presented legal arguments not raised by the Attorney General, including the plain meaning and constitutional arguments briefed here.

Richardson and others). (DI-Dallas Ex. 2)[2] Dallas County has a sophisticated system of judicial administration to handle the problems that arise in a major metropolitan county. (Tr. 4:144) Its thirty-seven district courts are divided into four specialized groups with principal responsibility for criminal, civil, family, and juvenile matters. (DI-Dallas Ex. 22) Although each court operates as an autonomous judicial entity, central administration of case docketing and jury selection from venire persons within the county provides for the quick and efficient administration of justice in Dallas County. (*See* Summary of Deposition of Hon. John McClellan Marshall, DI-Dallas Ex. 24)

District judges in Dallas County run for and are elected to the bench of a particular, specialized district court. (Tr. 5:81) Each court hears its own docket and decides its own cases; there is no collegial decisionmaking by any collective body of district judges. (*Id.*) Thus, each court is effectively a single-person elected position. In accordance with the long tradition in the State of Texas of the county being the fundamental unit of state government at the local level, each judge is elected county-wide and has primary jurisdiction county-wide. (Tr. 4:138) This decades-old system ensures that no particular single interest group in a diverse county can exercise undue influence over any particular judge, that all judges will have a county-wide perspective to match their county-wide jurisdiction, and that all voters in the county can

[2]All of Judge Entz's exhibits (noted "DI-Dallas Ex. x") were offered and admitted as a group. Tr. 4:72-74.

participate in the election of all judges with primary jurisdiction over the county.

Until recently, Dallas County was a one-party Democratic county. (Tr. 4:98) Beginning in about 1978, however, Dallas County government underwent a Republican revolution. The Dallas County bench in a short ten years transformed from completely Democratic to almost completely Republican. (Tr. 4:99; DI-Dallas Exs. 4A-8A) The simple fact in Dallas County judicial politics today is that only an anomalous Democratic candidate can be elected as a district judge.[3] Conversely, candidates who run as Republicans *will* get elected.[4]

This overwhelming trend to Republican judges is completely color-blind. Black Republican candidates have defeated white Democratic incumbents, and white Republican challengers have defeated highly qualified black Democratic incumbents who had virtually every conceivable endorsement.[5]

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[3]The *only* elected Democratic district judge in Dallas County is named Ron Chapman. Another Ron Chapman (of the Dallas based radio station KVIL) is the host of the top-ranked morning radio show in the Dallas area. (Tr. 4:101)

[4]This situation is true without regard to race, recommendation of the local Committee for a Qualified Judiciary, results of the local Bar poll, money spent in campaigning, and/or incumbency. All of the evidence from both sides is consistent on this point.

[5]For example, Jesse Oliver, a black Democrat, was a former state representative from a predominantly minority area of Dallas. He was appointed to the district bench following a relatively high-visibility state senate campaign. In running for reelection he received the endorsements of virtually all groups that offer endorsements -- both major Dallas newspapers, the Committee for a Qualified Judiciary (a non-partisan group), the local bar poll, and numerous civic groups. Although these endorsements contributed to his being one of the highest polling *(continued on next page)*

Of the nine contested primary and general district judge elections with a black candidate, the black Republican candidates won all four of the races in which they campaigned and the black Democratic candidates lost all five of the races in which they campaigned. (Tr. 4:106, DI-Dallas Ex. 9A) Dallas County voters are generally unaware of the name, office, or racial background of judicial candidates.[6]

Black Democratic judicial candidates fare equally as well as white Democratic judicial candidates, and typically do better than the top of the Democratic ticket (DI-Dallas Ex. 9A); one black Republican judicial candidate, Judge Carolyn Wright, led the ticket of all Republican candidates in Dallas County. (Tr. 4:213) Even Petitioners' expert Richard Engstrom candidly admitted that the evidence established that party affiliation rather than race is the best indicator of both the election results and which candidate would receive the support of the minority community. (Tr. 2:147-49) *Expert witnesses for both sides of the case and most of the losing black Democratic judicial candidates agreed that the losing black Democratic judicial candidates would have won had they run as*

(continued from previous page)
Democratic candidates in Dallas County, he still lost in the Bush-led Republican sweep of Dallas County. (Tr. 2:244; 2:247-52)

[6]*See* DI-Dallas Ex. 11. This exhibit is a survey of voter awareness of Dallas County judges. The survey indicated that the vast majority of voters of all races were wholly unaware of the identity of Dallas County judges, much less the race of those judges. Amazingly, even when told that persons named in the survey were elected public officials, most respondents identified Ron Chapman as a radio disk jockey. Charts summarizing the survey data are found at DI-Dallas Exs. 12-14. *See also* Tr. 4:104-23 (testimony of Dr. Champagne regarding survey).

Republicans — as they were all invited to do. (Tr. 2:188; 5:283-84) Black judicial candidates of both parties are faring neither better nor worse because of their race. Judicial candidates in Dallas County win or lose due to their partisan affiliation, not their race.[7]

The District Court ignored the political and practical reality and based its conclusions on the reality-blinding excursion of bivariate ecological regression analysis.[8] (November Order at 14-78) According to the 1980 Census, Dallas County was approximately 65% white, 19.7% black, and 15.3% Hispanic. (Tr. 4:130) In August, 1989, the Dallas County district bench was 91.7% white, 5.6% black, and 2.8% Hispanic. (Tr. 4:130; DI-Dallas Ex. 18A) Petitioners claimed that "underrepresentation" alone showed a violation of section 2, and used their statistical analyses to support their claims.

But the undisputed facts showed that, nationwide, the racial composition of a district bench will match the racial composition of the bar from which judicial candidates are

[7]It certainly also is true that black and white voters tend to show different voting patterns. Black Dallas County voters in judicial races tend to vote over 95% for the Democratic candidate, with a phenomenal 93% casting straight ticket votes. (Tr. 5:280) White voters tend to vote 60-70% for the Republican candidate, with a much smaller 28% straight ticket Republican vote. (Tr. 5:281; DI-Dallas Ex. 16) The amazingly high level of straight ticket voting by black voters, coupled with the relative lack of awareness or knowledge of judicial candidates, shows that even in the black community, judicial candidates get black votes not because of their race or qualification, but because of their partisan affiliation.

[8]"Bivariate ecological regression analysis" is a statistical technique that attempts to estimate voting patterns of racial groups. *See Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986).

drawn, rather than the population as a whole, *regardless of what system of judicial selection was used.*[9] The evidence showed that 2.2% of the lawyers in Dallas County are black. (Tr. 4:130) Dr. Champagne[10] testified accordingly that the Dallas County judicial bench (or Texas or New York benches) would have a racial composition that paralleled the number of minorities in the pool of legally qualified candidates. The number of minority law students is increasing; as those students graduate, pass the bar, and gain experience, the percentage of minority judges inevitably will increase. (Tr. 4:136-38) The judicial election *system* that the District Court condemned had nothing to do with the percentage of minorities on the bench.

The Petitioners' case rested primarily upon the statistical type of proof discussed above; conspicuously lacking from their case was any contention or testimony that the relief sought — single member districts — would have a positive impact on the role of minorities in connection with the judicial

[9]This was based on a comprehensive study of all likely factors involved in judicial selection, including the method of selection. The study showed that nationwide by far the highest correlation and the best explanatory factor for the number of minority judges in a jurisdiction is the number of minority lawyers. (Tr. 4:130-32) That correlation holds true in Dallas County, as well as the rest of the country.

[10]Dr. Anthony Champagne is a professor of political science at the University of Texas at Dallas, specializing in judicial selection; he is currently serving as a United States Supreme Court Judicial Fellow. He has published widely in the field. *See, e.g.*, Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 66 (1986); Champagne, *Judicial Reform in Texas*, JUDICATURE, Oct.-Nov. 1988, at 146; *see generally* DI-Dallas Ex. 3 (Champagne vita). Dr. Champagne testified as an expert witness for Judge Entz.

system other than permitting the election of some greater number of minority judges. The most probative testimony on this point came from Judge Wright of Dallas County and Judge Sturns of Tarrant County. Both of these black Republican judges believed that single member districts would be bad for minorities in the long term. They would lead to "black" seats on the bench, with public perceptions of "black" justice and "white" justice depending on the judicial district. (Tr. 4:192-93; 5:71-72) Black jurists, as a practical matter, would be limited to their quota of seats based on the number of majority-minority districts and would be unable to run from other districts. (*Id.*) The net result over time of single member districts would be a hardening of racial attitudes, rather than a color-blind system of justice. (*Id.*) That surely is not a goal to be pursued at the expense of a system that even the District Court acknowledged "has, for the most part, served us well for many years." (November Order at 6)

SUMMARY OF ARGUMENT

Section 2(b) of the Voting Rights Act was added in 1982 in the course of amendments designed to reverse this Court's ruling in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The amendments were designed to change the proof standard from "intent" to "results," and also to add protection against vote dilution to a statute that previously protected only access to the ballot. Petitioners characterize the issue before this Court as whether an amendment that was intended only to change the standard of proof should also be read to have accidentally excluded judges from the coverage of section 2.

This position makes sense only if one ignores the second goal of the 1982 amendments, to create a new dilution remedy.

With this second goal in mind, the question before the Court, properly understood, is: When Congress added new substantive scope to section 2 with the 1982 amendments, did they include judges within that new federal remedy? The straightforward way to answer that question is to look at the text of the new statute. The dilution remedy extends only to "representatives." Judges are not "representatives." Once section 2(b)'s purpose is understood, much of Petitioners' search for legislative history dealing with "intent to create an exception to the scope of the access protection of old section 2" becomes pointless. Section 2(b) is simply different from the old section 2.

Alternatively, if judge are somehow representatives, Petitioners are still not entitled to relief because district judges in Texas are single office holders, like a governor, rather than members of multi-member bodies such as legislators. District judges do not deliberate collegially, like legislators. Thus, the underlying representative theories that permit replacing at-large legislators with single member district legislators simply do not apply in the context of a solo decisionmaker, such as a district judge.

Finally, the Court should adopt one of the two preceding theories because if the Court determines that district judges are representatives — and representatives who, like legislators, can be reapportioned without altering the fundamental nature of their office — then the Court must address serious constitutional concerns over the validity of

section 2, as applied. First, the creation of a constitutionally valid judicial system, one that comports with the numerous due process and criminal procedure constitutional requirements, would require a federal intrusion into core state sovereign activities to an extent that would violate principles of federalism and the guaranty clause. Doing this on the belief that judges are representatives and should be treated like political representatives offends notions of separation of powers. Finally, if these more specific attacks should fail, the Court must confront the question whether section 2 was constitutionally adopted in the first place.

This Court tries, when possible, to avoid consideration of constitutional issues. Here, especially when there is a viable and compelling alternative, the Court can resolve this case simply by reading the statute. Section 2(b) applies to representatives; judges are not representatives.

ARGUMENT

I. DISTRICT JUDGES ARE NOT REPRESENTATIVES AND THEREFORE WERE NOT INCLUDED WITHIN THE SCOPE OF THE EXTENSION OF SECTION 2

A. The 1982 Amendments to Section 2 Added Both a Results Test and a Dilution Remedy

It is widely understood that the 1982 amendments to section 2 were a congressional response to this Court's opinions in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). This is often stated in terms of a congressional attempt to replace an intent standard with a results standard in section 2.

What Petitioners completely ignore — and what is crucial for this case — is that Congress also supplemented section 2 to protect against dilution of voting rights, as well as against impairing access to the ballot.

By ignoring the second aspect of the amendment, Petitioners are able to mischaracterize the thrust of the 1982 amendments as simply altering the proof standard and thereby equating the substantive reach of the pre- and post-amendment section 2. Petitioners thus improperly transform the question before the Court to whether the 1982 amendments inadvertently excluded judges from the unquestioned coverage of the pre-amendment section 2. In fact, when the dual nature of the 1982 amendments is considered, the issue is whether the addition of new substantive coverage reached far enough to include judges. Because Petitioners' fundamentally erroneous perspective permeates their argument, Judge Entz addresses it even before considering whether judges are included in the plain meaning of "representative."

City of Mobile involved attacks under section 2, the Fifteenth Amendment, and the Fourteenth Amendment. *Id.* at 58. This Court's distinct treatment of each attack holds the key to understanding the 1982 amendments to section 2. The plurality initially ruled that section 2 was coterminous with the Fifteenth Amendment. *Id.* at 60-61 (Part II). It then addressed the Fifteenth Amendment claims and held first, that a Fifteenth Amendment claim requires a showing of discriminatory intent, *id.* at 61-63, and second, that there was no showing of any abridgment of the right to access to the ballot and therefore no Fifteenth Amendment violation: "Having found that Negroes

in Mobile 'register and vote without hindrance,' the District Court and the Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Id.* at 65. Thus, plaintiffs lost under the Fifteenth Amendment not because of the heightened standard of intent, but because they did not show any impairment of their rights to access to the ballot.[11] The plurality then

[11]This view of the Fifteenth Amendment as protecting only access to the ballot is consistent with this Court's longstanding view of that Amendment's reach. Beginning in companion cases *Guinn v. United States*, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915), the Court outlawed the application of "grandfather clauses" that exempted from literacy tests those persons either entitled to vote prior to the passage of the Fifteenth Amendment or those who were lineal descendants of persons entitled to vote prior to such time. In both cases, passage of the literacy tests were a precondition to voting. Thus, the grandfather clauses were prohibited by the Fifteenth Amendment because they operated in conjunction with the literacy test to deny black citizens access to the polls.

Likewise, onerous procedural requirements that effectively handicapped the black franchise are prohibited by the Fifteenth Amendment. In *Lane v. Wilson*, 307 U.S. 268 (1939), the Court struck down an Oklahoma law that perpetually disenfranchised all those citizens who failed to register to vote in a short eleven day period in 1916. The exception for failure to register was for those who had voted in 1914. Of course, blacks had not voted in 1914 because they were barred from the polls by the discriminatory application of literacy tests.

In *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953), the Court outlawed all-white primaries, pursuant to which blacks were prevented from voting in the controlling parties' primary, but were allowed to vote in the general election in which the victor of the all-white primary ran unopposed. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court struck down a racial gerrymander that fenced the black residential area out of the city limits, rendering them ineligible to vote in city elections. Finally, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court upheld the literacy test ban, as well as other provisions of the Voting Rights Act that attempted to protect the physical casting of ballots, as an appropriate

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considered plaintiffs' dilution attack on the at-large system, but only in its discussion of equal protection under the Fourteenth Amendment. *Id.* at 65-80 (Part IV).[12]

Thus, the ruling in *City of Mobile* that section 2 was coterminous with the Fifteenth Amendment affected section 2 in two ways: (1) it restricted section 2 to intentional discrimination, and (2) it restricted section 2 to impaired access to the ballot claims under the Fifteenth Amendment, and excluded coverage for dilution claims under the Fourteenth Amendment. Congress was well aware of this second restriction on section 2 when considering the 1982 amendments and intended to alter that limitation, as well as adopt a results test:

> Likewise, although the plurality [in *City of Mobile*] suggested that the Fifteenth Amendment may be limited to the right to cast a ballot and may not extend to claims of voting dilution (without explaining how, in that case, one's vote could be "abridged"), this section without question is aimed at discrimination which takes

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exercise of congressional authority to protect minority access to the polls under the Fifteenth Amendment.

[12]Again, the plurality's view that qualitative vote dilution is prohibited by the Equal Protection Clause of the Fourteenth Amendment, not by the Fifteenth Amendment, is consistent with this Court's well-established reading of the Fourteenth Amendment. *See, e.g., Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). Guaranteed access is a Fifteenth Amendment protection; meaningful access springs from the Fourteenth Amendment. Hence, the Supreme Court's analysis of claims that multi-member districts were being used invidiously to cancel out or minimize the voting strength of racial groups always has been an equal protection analysis. *White v. Regester*, 412 U.S. 755, 764 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 142-44 (1971); *Fortson v. Dorsey*, *supra*, at 439.

> the form of dilution, as well as outright denial of the right to register or to vote.

S. REP. No. 97-417, 97th Cong., 2d Sess. 30 n.120 (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 208 n.120. *See also id.* at 25 (acknowledging plurality's reading of Fifteenth Amendment as excluding dilution claims). Congress thus based the 1982 amendments on both the Fourteenth and Fifteenth Amendments. *See id.* at 18, 27, 39.

Congress plainly drafted the 1982 amendments to section 2 to accomplish both of its remedial goals in light of *City of Mobile*. In what is now subsection (a), Congress added "results" language. Congress also added subsection (b), which created a dilution remedy in section 2. The question raised by this case, then, is whether Congress included judges within the scope of the dilution remedy it added in the 1982 amendments to section 2.

B. Judges Are Not Included in the Plain Language of Section 2(b)

In his majority opinion in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), Judge Gee analyzed the meaning of Section 2(b) of the Voting Rights Act using the plain language of the section. Judge Entz will not attempt to improve on Judge Gee's lucid demonstration that the plain meaning of "representative" does not include judges. In concluding that Congress could not have intended to include judges within the definition of "representatives," Judge Gee wrote that "[g]iven the mutual exclusiveness of the two terms, to suggest that Congress chose 'representatives' with the intent of including judges is roughly on a par with suggesting that the

term *night* may, in a given circumstance, properly be read to include *day*." *Id.* at 628-29 (emphasis in original).[13] Ask people on the street; they will, to a person, say "judge" is different than "representative."[14]

Holding that judges are not representatives still provides ample protection for minority voting rights in judicial elections. First, any act that is intentionally dilutive is directly actionable under the Fourteenth Amendment. Second, any action that results in minorities having diminished access to the ballot in judicial elections is actionable under section 2(a). Thus, a plain reading of the statute provides a workable result, without resorting to the quagmire of legislative history.

Resorting to legislative history to find a gloss for the plain import of a statute can be unreliable, since it can be manipulated by any legislator who takes the time to express his or her views on the record as to what the statute means. Such statements are not ratified by Congress when it passes the bill, and, in reality, are rarely known by people who vote for the bill. "[I]t must be assumed that what the Members of the House and Senators thought they were voting for, and what

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[13]Holding that judges are elected representatives, like legislators, also would make a mockery of notions of separation of powers.

[14]The dictionary defines "representative" as: "one that represents another or others in a special capacity. . . one that represents a constituency as a member of a legislative or other governing body." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1926 (1976). The word has no peculiar legal definition: "A person chosen by the people to represent their several interests in a legislative body; *e.g.* representatives elected to serve in Congress from a state congressional district." BLACK'S LAW DICTIONARY 1302 (6th ed. 1990).

the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said." *United States v. Taylor*, 487 U.S. 326, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part). Therefore, the legislative history is not to be considered by a court at all unless the language of the statute is so ambiguous the court is at a loss to make sense of it. The judiciary is to "interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with unenacted legislative intent." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53, (1987) (Scalia, J., concurring).

Although in years past the Supreme Court may have appeared to deviate from this doctrine at times, this Court's more recent decisions have reaffirmed this standard. In *United States v. Monsanto*, 109 S. Ct. 2657 (1989), one party sought to persuade the Court through the use of legislative history. The Court responded: "In determining the scope of a statute we must look first to its language." *Id.* at 2662. The Court then rejected the tender of postenactment legislators' statements explaining congressional intent behind the statute, and stated: "As we have noted before, such postenactment views 'form a hazardous basis for inferring the intent' behind a statute; instead Congress' intent is best determined by looking to the statutory language it chooses." *Id.* at 2663 (citations omitted).

Judge Higginbotham, in his concurrence below, reached into the legislative history only after he determined that an ambiguity arose because he thought elected judges were "representatives" to the extent that electoral accountability

inherently implies some degree of representation. *LULAC*, 914 F.2d at 636. Equating accountability with representation, however, is a mistake.

Accountability deals with who hires and fires; representation deals with the function of the position, whether one person speaks and acts for another. In many instances the two concepts overlap. For example, a Member of Congress is accountable to his or her constituents and also represents those constituents. The coincidence of these two concepts, however, is not automatic. For example, prior to the Seventeenth Amendment, senators were selected by state legislators; the senators so selected nonetheless did not "represent" the state legislators, but rather the people of the state. The honorable Justices of this Court are appointed by the President and can be removed by the Senate; no one would contend, however, that the Justices "represent" either the President or the Senate.[15]

In short, Judge Higginbotham erred. The fact that Texas' judges are elected in no sense creates an ambiguity regarding whether they are in some sense "representatives" of Texas voters. Absent that ambiguity, there is no basis for exploring the legislative history of section 2, either from 1965 or from 1982. "Representative" is a simple word with a

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[15]Conversely, one can represent without being elected. "In its original conception, representation did not always require voting, as can be shown in the Declaration of Independence. The body of this document consists of a long bill of particulars against George III which would be unnecessary and misleading if representation required voting." Mansfield, *Impartial Representation*, in REPRESENTATION AND MISREPRESENTATION 106 (R. Goldwin ed. 1968).

meaning plain enough to require no further inquiry. The Court need go no further than the face of the statute.

C. Neither Rules of Construction Nor Legislative Intent Can Transform Judges into Representatives

As discussed above, there is no need for this Court to turn to evidence of legislative intent or apply canons of statutory construction because the text of the statute itself is clear.[16] Faced with the awkward fact of the statutory language, Petitioners and *amicus* the United States prefer to discuss legislative history and canons of construction. One fact apparent from the legislative history is that Congress simply did not give much consideration to the prospect that

[16]If the Court is inclined to apply canons of construction, Judge Entz commends the one used below by Judge Gee:

> In 1982, as of the time of Congress's adoption of the Court's language from *White*, at least fifteen published opinions by federal courts . . . had held or observed that the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections. Not one held to the contrary. . .
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> . . .
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> . . . By the settled canon of construction, we must presume that Congress was aware of the uniform construction which had been placed by the courts on the term that it selected, a construction by which the judicial office was not deemed a "representative" one.

LULAC, 914 F.2d at 626, 628 (citations and footnote omitted). *See also Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973) ("Judges do not represent people, they serve people."); *Hatten v. Rains*, 854 F.2d 687, 696 (5th Cir. 1988) ("Judges, even if elected, do not serve a primarily representative function.").

litigants might some day claim that judges are "representatives" subject to section 2(b). Thus, the legislative history debate turns into a procedural question: Who must "prove" Congress' intent regarding coverage of judges?

Petitioners attempt to shift the burden and require Respondents to show that Congress intended to exclude judges. Normally a party seeking relief under a statute has the burden of showing that the statute applies. Even more to the point, as discussed above, section 2(b) was an extension of section 2 to add a dilution test. Given that context, *Petitioners* should bear the burden of showing that when Congress extended section 2 to add a dilution test, Congress intended the extension to reach judges.

In a related form of that argument, Petitioners urge a syllogism on the Court: (1) amended section 2 covers everything old section 2 covered; (2) old section 2 covered judges; therefore (3) new section 2 covers judges.[17] The syllogism is defective because the major premise is wrong. Section 2(b) facially has diminished scope from the old section 2.

The old section 2 (and the current section 2(a)) cover all voting; section 2(b) covers only voting related to electing people. For example, old section 2 and current section 2(a) would cover a referendum or a vote on a state constitutional amendment, while section 2(b) facially does not cover those. Thus, even prior to addressing the question whether judges are

[17]This argument proceeds wholly independently from the statutory language, which seems an unusual method of statutory construction.

"representatives" we know that the syllogism fails — we know the scope of section 2(b) is different than the scope of old section 2 and simply must determine how *much* different.[18]

Finally, in an attempt to gain from the legislative silence on the subject, the United States urges this Court to draw a negative inference from the fact that Congress did not explicitly say much about judges. Brief for the United States at 32 & n.28, *Chisom v. Roemer*, Nos. 90-757 and 90-1032. Hinting that detective skills are needed to ascertain Congress' intent, the United States relies upon the principle of "the dog that did not bark," citing A. DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES (1927).[19] The United States should have consulted a different Holmes: "You must not alter words in the

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[18]Viewed in this framework, Petitioners' reliance on the broad definition of voting in section 14(c)(1) is even less pertinent, particularly given the fact that section 2(b) does not use the term. Also, by their logic, a provision that referred to "voting for dogcatcher" would apply to judges because of the broad definition of "voting." Likewise their reliance on the scope of section 5 is pointless. The issue is not the scope of old section 2, of new section 2(a), of section 5, or of section 14(c)(1). The issue is, simply, whether judges are "representatives" under section 2(b).

[19]The majority opinion in the very case the United States cites specifically rejected drawing that negative inference:

> [I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 (1980).

interest of imagined intent . . . ." *United States v. Riggs & Co.*, 203 U.S. 136, 27 S. Ct. 39, 40 (1906) (Holmes, J.).[20]

II. A SECTION 2(b) ATTACK DOES NOT LIE AGAINST TEXAS' DISTRICT COURTS BECAUSE THEY ARE SINGLE MEMBER DISTRICTS

Even if judges were to be "representatives" under the amended section 2(b), Petitioners' dilution claim would still be flawed because district courts are already single member districts. Petitioners characterize this argument as an improper creation of a single officeholder exception out of the whole cloth. This rhetorical ploy is similar to their demand that Respondents prove that Congress intended to exclude judges from the amended section 2. Rather than being a judge-made exception to the statute, it is simply an inherent limitation in the logic of a dilution attack on an at-large position. *See Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985). Unlike Petitioners, *amicus* the United States acknowledges the truth of this observation. Brief of the United States at 12-15. Judge Entz will not reiterate the United States' argument.

The United States errs, however, in its assessment of how one determines whether an office is a single member office. According to the United States, one simply looks around to see how many of those offices exist in a jurisdiction.

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[20]*See also LULAC*, 914 F.2d at 630 ("[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute.") (quoting *Greenwood v. United States*, 350 U.S. 366, 374 (1956) (Frankfurter, J.)).

The United States overlooks the very logic that justifies the use of single member districts in a legislative body.

The policy underlying single member districts in a legislative context is to permit each discrete group in the larger community to have a representative who will articulate that group's needs and interests in the process of collective decision making. Through the political process, a collective decision will be reached that properly reflects a balance of all of the interests in the community. That model is simply lacking for Texas' district courts.

The trial proof showed that Texas' district courts are not collegial bodies. *LULAC*, 914 F.2d at 647 (Higginbotham, J., concurring)(referencing Texas Supreme Court Chief Justice Phillips' testimony at trial). Each court operates autonomously from the other courts in handling its docket and performing its judicial functions. Unlike appellate courts, there is no joint deliberation. *See also LULAC*, 914 F.2d at 649 (Higginbotham, J., concurring). The Voting Rights Act "cannot be made to authorize allocating judges by simply restating the office of a district judge as a shared office or by asserting that the 'function' of an office is not relevant. Saying that district judges in fact share a common office that can be subdistricted does not make it so." *Id.*[21]

[21]Petitioners make two contrary arguments. First, they argue that this analysis improperly makes relief to voters depend on the nature of the office. In fact, however, it is the petitioners who chose to make a dilution attack that is inherently limited to multimember offices. Given that inherent limitation, it is plainly necessary to look at the office under attack at least enough to determine whether the limitation is at issue, as it is here.

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III. THIS COURT SHOULD NOT CONSTRUE SECTION 2(b) TO REACH TRIAL JUDGES BECAUSE THAT WOULD REQUIRE THIS COURT TO ADDRESS SERIOUS AND FUNDAMENTAL CONSTITUTIONAL QUESTIONS

If section 2(b) were construed to apply to Texas' district judges, this Court would have to face difficult constitutional questions regarding the validity of section 2(b) so applied. Of course, the existence of these constitutional questions is in itself a reason to construe section 2 not to apply to district court judges. *E.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932). Three serious constitutional questions here argue against construing section 2(b) to apply to Texas' district judges. First, such an application would be an unconstitutional intrusion by the federal government into the intrinsically sovereign aspects of state government. Second, it would unconstitutionally blur the line of separation between judges and the representative arms of government. Finally, if not

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Second, they argue that contrasting multi versus single member offices improperly imports a remedy issue into the liability phase of the case; remedies other than single member offices are possible, such as cumulative voting, they urge. As discussed below, experimental remedies like cumulative voting probably are not permissible judicial remedies. *See infra* note 26. Moreover, this inquiry is not an impermissible injection of remedy in the liability phase, but rather a mandatory inquiry to determine whether the attacked feature -- county-wide election -- is what causes the allegedly dilutive circumstance. *Cf. Thornburg v. Gingles*. Had Petitioners attacked a different feature of the system -- such as a majority vote requirement, had Texas used one -- no such inquiry would be needed. Having chosen to make a dilution attack on the county-wide elections, Petitioners should not now object to the inquiry needed to evaluate that attack.

construed differently or held unconstitutional as applied, this Court would have to consider the general question whether the 1982 amendments to section 2 were constitutional. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 36 S. Ct. 658, 659 (1916) (Holmes, J.).

A. Application of Section 2(b) to Texas' State Judiciary Would Unconstitutionally Impinge on Intrinsically Sovereign Matters

1. States Retain a Residual Core of Sovereignty Into Which the Federal Government Cannot Intrude. — For a federal court to dismantle Texas' judicial system would be an unconstitutional intrusion by the federal government into matters of paramount importance to the sovereign state government, in violation of the Tenth Amendment, the Guaranty Clause, and fundamental principles of federalism.[22]

The judiciary is an essential governmental function of the states, and dismantling it "would hamper the state government's ability to fulfill its role in the Union and endanger its separate and independent existence." *United Trans. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687 (1982); *see also Garcia v. San Antonio Metropolitan Transit*

[22]Judge Entz acknowledges that the 14th and 15th Amendments place limitations on the power of states; they did not abolish federalism, however. "Whenever constitutional concerns . . . come in conflict . . . it is and will remain the duty of this Court to reconcile these concerns in the final instance." *Garcia v. San Antonio Metro. Transit Author.*, 469 U.S. 528, 589 (1985) (O'Connor, J., dissenting).

Authority, 469 U.S. 528, 549 (1985) (although overturning *National League of Cities*, the Court recognizes that states occupy a special position in the constitutional system and they do retain a significant amount of sovereign authority); *Coyle v. Smith*, 221 U.S. 559 (1911) (noting restrictions on Congress' ability to prescribe fundamental details of state government such as location of state capitol). As this Court declared in *Texas v. White*, 74 U.S. 700 (1869), "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." *Id.* at 725. Further, as Justice Black noted in his majority opinion in *Oregon v. Mitchell*, 400 U.S. 112 (1970):

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

Id. at 125.

Consequently, the federal government should tread lightly, granting substantial leeway to the states' establishment and maintenance of judicial systems. As discussed below, *see infra* Part III.A.2, implementation of a remedy will involve the federal courts in dictating the finest details of state judicial structure and administration, including jury selection, jurisdiction, venue, and systems of judicial specialization. As Judge Higginbotham stated, "subdistricting would work a

fundamental change in the scheme of self governance chosen by the State of Texas, for it would change the authority behind the decision-making body of Texas Courts — and in doing so it would retard, not advance the goals of the Voting Rights Act." *LULAC*, 914 F.2d at 651 (Higginbotham, J., concurring).

Although states must defer in many respects to the federal government, states still have a residue of sovereignty that the federal government cannot disturb. To force wholesale, untested and perhaps unworkable changes upon a state judicial system based upon the sociologically distorted, mathematical vote dilution proof Petitioners offered, would violate the Tenth Amendment, the Fourteenth Amendment, the Guaranty Clause, and fundamental principles of federalism and separation of powers.[23]

2. Application of Section 2(b) to State Judges Would Impermissibly Intrude on the Operation of the State Judiciary. — The current system of judicial administration in Dallas County supports fundamental state interests. A remedy in this case necessarily must involve either altering fundamental characteristics of that system, such as county-wide venue and

[23]Congress' ability to interfere with the operation of state government under the authority of the Fourteenth or Fifteenth Amendment is even more questionable since section 2 is outside the scope of the amendments' literal protection. The Fourteenth and Fifteenth Amendments protect only against intentional discrimination. *See City of Mobile, supra*. The amended section 2, in contrast, purportedly reaches unintentional action that affects the results in elections. If that is a permissible exercise of congressional power to begin with, *see infra*, it surely is at the nadir of Congress' power, and the power of a statute to displace sovereign state governmental functions must be correspondingly reduced.

jury selection, or attempting to preserve those features while changing elections to smaller than county-wide districts. The District Court's proposed interim remedy followed this latter approach. In either case, the remedy would entail immense intrusion into the finest details of Texas' administration of its judicial system and would be unconstitutional.

Cases filed in Dallas County are randomly assigned to the various judges' dockets. By adopting smaller than county-wide districts while preserving county-wide jurisdiction and venue, the Petitioners would ensure that residents of Dallas County would have cases heard by judges in whose elections they cannot vote. In a "pure" system with thirty-seven single member judicial districts, 36/37 of the voters in Dallas County are thus effectively disenfranchised from voting for any given judge.[24] In such a case, the voters are unconstitutionally disenfranchised, just as the nonproperty owners in *Oregon v. Mitchell*, 400 U.S. 112 (1970), were unconstitutionally prevented from voting in a municipal bond election because of their substantial and direct interest in the matter voted upon. *See also City of Phoenix v. Kolodziejski*, 399 U.S. 204, 213 (1970) (exclusion of nonproperty owners from elections approving obligation bonds violated Equal Protection Clause). In an attempt to advance the voting rights of a minority,

[24]Petitioners suggest that the use of substitute "visiting" judges in some circumstances indicates the policy for voting for judges in Texas is weak. They ignore the fact that visiting judges are used only at the direction of the elected presiding judge, TEX. GOV'T CODE ANN. § 74.056, thus electoral accountability is retained. They also ignore the fact that parties have an absolute right to object to the assignment of a visiting judge in a case. TEX. GOV'T CODE ANN. § 74.053.

Petitioners' solution would unconstitutionally deprive most voters of *their* "judicial" voting rights.

A pure single member district plan also creates difficulties in allocating newly created courts in between the decennial censuses, as illustrated when the district court below imposed its interim single member district plan. The allocational problem in Dallas County was dividing thirty-seven judicial positions among a different number of state legislative districts. At the urging of Petitioners and the Attorney General, the District Court gave the "extra" judicial seats to those legislative districts with the greatest number of minority voters. Thus, judges were allocated in a preferred manner to minority districts. This is surely one of the most flagrant violations of equal protection ever committed in the name of equal rights. The same kind of allocation problem inevitably will occur under any plan to create additional judicial districts between the censuses in response to increased case load.[25]

[25]The interim plan also unconstitutionally allocated courts of the various specializations among the various judicial districts; it permitted the county administrative judge to allocate specialization *after the election*, however he or she sees fit. Thus, some voters were deprived of a civil judge, some of a juvenile judge, and so on. Absent some scheme of four concurrent sets of overlapping single member districts, no single member district plan can avoid this unconstitutional allocation of specialized courts. Moreover, under the specifics of the interim plan, the discretion of the administrative judge to assign specializations apparently was wholly unconstrained, which also surely violates due process and equal protection. *See Hurtado v. California*, 110 U.S. 516, 535-36 (1884). It also was impractical in that a successful civil lawyer judicial candidate with no criminal experience could end up assigned to a criminal bench.

Finally, jury pools in Dallas County are drawn from the entire county. This system complies with an accused's right to trial before a jury from the judicial district in which the offense arose. U.S. CONST. AMEND. VI; *United States v. Dickie*, 775 F.2d 607 (5th Cir. 1985). By creating an interim plan in which the districts were smaller than county-wide, but jury selection remained county-wide, the District Court created a system of jury selection that is constitutionally impermissible for criminal cases. Inevitably, under a system of smaller than county-wide districts, an accused from one Dallas County district will be forced to stand trial before a jury containing persons from four or five different Dallas districts for a crime committed in a completely different district. In such a case, the accused would be denied his constitutional rights. *Id.*

The only alternative to avoiding those problems is to alter the current systems of court specialization, jury selection, venue, and court administration, which presents the constitutional problem of undue intrusion into core features of state government.[26] These established systems have evolved

[26]Petitioners suggest that other alternative remedies, such as cumulative or limited voting would avoid these infirmities. What they neglect is that courts' remedial powers in Voting Rights Act cases do not extend to imposing experimental forms of voting upon a state. *See Wise v. Lipscomb*, 437 U.S. 535, 540-41 (1978) (noting "requirement that federal courts, absent special circumstances, employ single-member districts when they impose remedial plans"); *Martin v. Mabus*, 700 F. Supp. 327, 336-37 (S.D. Miss. 1988) (declining to impose limited voting plan court viewed as "experimental"). Admittedly, it is possible that the State of Texas could invent some entirely different form of judicial selection and administration that would avoid the constitutional pitfalls of a single member remedy; the need for such invention, however, simply heightens the unconstitutional intrusion into core concerns of a sovereign state government that application of the statute to the judiciary would have.

locally through years of experience. The systems work, and are of vital importance to the efficient and orderly administration of justice in Dallas County. Although states' rights are limited by the Civil War amendments and by other powers expressly delegated to the federal government, the states do retain the rights to govern themselves with respect to the basic elements of governance. Recent case law does not explicitly list the states' fundamental rights, but surely the power to establish and maintain an independent judiciary is among them. *See supra* Part III.A.1.[27] Texas has over the years developed an intricate machinery for the administration of justice that fully complies with all constitutional requirements. Simply yanking out a part or two — countywide elections — produces a machine that does not work, i.e., that is not constitutional. The alternative of redesigning the system entirely is not a legitimate task for the federal government or a federal judge.[28]

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[27]The United States suggests that the proper way to account for these competing interests is simply to incorporate those concerns into the "totality of circumstances" that the district court considers in determining liability under section 2. *See* Brief of the United States 17-28. But the United States forgets that the "Senate Factors" include assessing the weight of state policy underlying the challenged practice, and the district court here at least purported to consider that factor. Urging that such concerns should be treated as compelling is not substantially different from urging, as Judge Entz does, that they are so compelling that interference with them rises to the level of a constitutional concern. In either case, the Voting Rights Act is not sufficiently forceful to displace those important state policies.

[28]"It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed." *LULAC*, 914 F.2d at 630-31.

B. Applying Section 2(b) to Judges Violates Principles of Separation of Powers

The Petitioners' suggested application of Section 2(b) to state district judges would abolish substantial distinctions between the executive, legislative and judicial branches. That is contrary to the finely-honed balance of powers (and counter-balancing of the natural human desire for power, if left unchecked) that the federal constitution embodies. *See, e.g.*, THE FEDERALIST No. 9, at 51 (A. Hamilton) (J. Cooke ed. 1961); *id.* No. 47, at 323 (J. Madison); *id.* No. 48, at 335 (J. Madison). Texas had a similar, clear separation of powers ingrained in its organic framework. *See* TEX. CONST. art. II, § 1.

At the core of every state's government is the judiciary. Whether appointed or elected, the judiciary is the arbiter of the citizens' disputes, the forum for victims of crime, and the protector of its citizens' fundamental rights and freedoms. While the legislative and executive branches are in perpetual flux, according to the rough and tumble political whims of the times, the judiciary is the only constant. *See LULAC*, 914 F.2d at 625-26. The legislative and executive branches rightfully may be partial, but as Judge Gee stated, "the judiciary serves no representative function whatever: the judge represents no one." *Id.* at 625. Judge Higginbotham in his concurring opinion in *LULAC* explained that "requiring

subdistricting for purposes of electing district judges, unlike other offices, would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not fact of its judicial independence — a core element of a judicial office." *LULAC*, 914 F.2d at 650 (Higginbotham, J., concurring).

The Petitioners not only would redefine judges as "representatives" but would classify particular judges as accountable to the majority sentiment in small, legislative subdistricts from which they were to be elected. Such a result is directly contrary to the foundation of our system of government in which "the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time." THE FEDERALIST NO. 48, at 335 (J. Madison)(J. Cooke ed. 1961). Texas incorporates the same concept. *See* TEXAS CONST. art. II, § 1. Congress surely did not mean to strike from Texas' "separation of powers" the key concept so carefully woven in the federal constitution and extended to the states through the Guaranty Clause.[29]

Judge Gee, quoting Professor Eugene Hickok, accurately summarizes Judge Entz's argument:

> The judiciary occupies a unique position in our system of separation of powers, and that is why the job of judge differs in a fundamental way from that of a

[29]"Judicial power" as used in Texas' constitution, *see* Art. V § 1, does not mean to be a representative of the people. That is what the state Senators and Representatives do in making laws. In fact, Article II specifically provides that no person associated with one branch "shall exercise any power properly attached to either of the others."

> legislator or executive. . . . If a member of congress serves to make the law and a president to enforce it, the judge serves to understand it and interpret it. In this process, *it is quite possible for a judge to render a decision which is directly at odds with the majority sentiment of the citizens at any particular time. . . .* Indeed, it can be argued that *the quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour.*

LULAC, 914 F.2d at 626 (quoting Hickok, *Judicial Selection: The Political Roots of Advice and Consent* in JUDICIAL SELECTION: MERIT, IDEOLOGY AND POLITICS 5 (1990), emphasis added).

C. The 1982 Amendments to Section 2 Were Not A Valid Exercise of Congress' Authority

The Supreme Court has never considered whether the 1982 amendments to Section 2 were a valid exercise of congressional authority. Prof. Lawrence Tribe, never one to be mistaken for a conservative constitutional scholar, notes that there is real doubt on that question. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14, at 340 (2d ed. 1988). Congress itself seriously questioned the constitutionality of the Section 2 amendments. In fact, the Subcommittee on the Constitution concluded in its report that the proposed amendment was unconstitutional for three reasons. First, Congress cannot outlaw discriminatory results under the Fifteenth Amendment, since the Supreme Court has stated that

only discriminatory intent was prohibited.[30] Second, unlike Section 5, there was no fact finding by Congress that Section 2 was necessary as a nationwide remedial measure. Without such a fact finding, Congress even questioned if Section 2 could qualify as a "remedial" measure.[31] Finally, Section 2

[30]"To the extent . . . that the Supreme Court has construed the Fifteenth Amendment to require some demonstration of purposeful discrimination in order to establish a violation, and to the extent that Section 2 is enacted by Congress under the constitutional authority of the Fifteenth Amendment, the Subcommittee does not believe that Congress is empowered to legislate outside the parameters set by the Court, indeed by the Constitution." 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 342-43 (COMMITTEE ON THE JUDICIARY'S SUBCOMMITTEE ON THE CONSTITUTION, REPORT ON S. 1992 TO AMEND THE VOTING RIGHTS ACT OF 1965, attached as exhibit to Additional Views of Senator Hatch, S. REP. NO. 417, 97th Cong., 2d Sess. 94 (1982)).

[31]"While proponents of the new results test argue that selected Supreme Court decisions exist to justify the expansive exercise of Congressional authority proposed here this subcommittee rejects these arguments. No Court decision approaches the proposition being advocated here that Congress may strike down on a nationwide basis an entire class of laws that are not unconstitutional and that involve so fundamentally the rights of republican self-government guaranteed to each state under Article IV, section 4 of the Constitution.

"It must be emphasized again that what Congress is purporting to do in section 2 is vastly different than what it did in the original Voting Rights Act in 1965. In *South Carolina v. Katzenbach*, the Court recognized extraordinary *remedial* powers in Congress under section 2 of the Fifteenth Amendment. *Katzenbach* did not authorize Congress to revise the nation's election laws as it saw fit. Rather, the Court there made clear that the remedial power being employed by Congress in the original Act was founded upon the actual existence of a substantive constitutional violation requiring some remedy . . . While *Katzenbach* and later *City of Rome* held that the extraordinary powers employed by Congress in section 5 were of a clearly remedial character, and therefore justified the extraordinary procedures established in section 5, there is absolutely no record to suggest that the proposed change in section 2 involves a similar remedial exercise. Because section 2 applies in scope to the entire Nation, there is the necessity of demonstrating that the 'exceptional' circumstances found by the *Katzenbach* court to exist in the covered jurisdictions in fact permeated the entire Nation (although again by

(continued on next page)

has an unconstitutional retroactive effect.[32] This Court, like the Subcommittee, should find that Section 2 is unconstitutional for those reasons.

CONCLUSION

For the reasons discussed above, Judge Entz requests that this Court affirm the decision of the Fifth Circuit and render judgment in Judge Entz's favor.

(continued from previous page)
its very definition the concept of 'exceptionality' would seem to preclude such a finding).

"There has been no such evidence offered during either the House or Senate hearings. Indeed, the subject of voting discrimination outside the covered jurisdictions has been virtually ignored during hearings in each chamber. Indeed as the strongest advocates of the House measure themselves argued, a proposed floor amendment to extend preclearance nationally was 'ill-advised' because no factual record existed to justify this stringent constitutional requirement." *Id.* at 343-44.

[32]"Moreover, a retroactive results test of the sort contemplated in the House amendments to section 2 (the test would apply to existing electoral structures as well as changes in those structures) has never been approved by the Court even with regard to jurisdictions with a pervasive history of constitutional violations. In *South Carolina v. Katzenbach*, the prospective nature of the section 5 process (applicable only to *changes* in voting laws and procedures) was essential to the Court's determination of constitutionality. This was closely related to findings by Congress that governments in certain areas of the country were erecting new barriers to minority participation in the electoral process even faster than they could be dismantled by the courts. Thus, even with regard to covered jurisdictions, the Court has never upheld a legislative enactment that would apply the extraordinary test of section 5 to existing state and local laws and procedures." *Id.* at 344-45.

Respectfully submitted,

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OFFICE OF THE CLERK

NO. 90-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT-INTERVENOR HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD

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QUESTION PRESENTED

Does Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b), as amended, apply to vote dilution claims in judicial election systems generally or as they relate to elections of trial judges from independent but overlapping, county wide districts?

LIST OF PARTIES

The participants in the proceedings below were:

Plaintiffs:

LULAC Local Council 4434
LULAC Local Council 4451
LULAC (Statewide)
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Willard Pen Conat
Gene Collins
Al Price
Theodore M. Hogrobrooks
Ernest M. Deckard
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty
Jesse Oliver
Fred Tinsley
Joan Winn White

Defendants:

Dan Morales, Attorney General of Texas
Jim Mattox, former Attorney General of Texas
George Bayoud, Secretary of State
Texas Judicial Districts Board

Thomas R. Phillips, Chief Justice, Texas Supreme Court
Mike McCormick, Presiding Judge, Court of Criminal Appeals
Ron Chapman, Presiding Judge, 1st Administrative Judicial Region
Thomas J. Stoval, Jr., Presiding Judge, 2nd Administrative Judicial Region
James F. Clawson, Jr., Presiding Judge, 3rd Administrative Judicial Region
John Cornyn, Presiding Judge, 4th Administrative Judicial Region
Robert Blackmon, Presiding Judge, 5th Administrative Judicial Region
Sam B. Paxson, Presiding Judge, 6th Administrative Judicial Region
Weldon Kirk, Presiding Judge, 7th Administrative Judicial Region
Jeff Walker, Presiding Judge, 8th Administrative Judicial Region
Ray D. Anderson, Presiding Judge, 9th Administrative Judicial Region
Joe Spurlock II, President, Texas Judicial Council
Leonard E. David

Defendant-Intervenors:

Judge Sharolyn Wood
Judge Harold Entz
Judge Tom Rickoff
Judge Susan D. Reed
Judge John J. Specia, Jr.
Judge Sid L. Harle
Judge Sharon Macrae
Judge Michael D. Pedan

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NO. 90-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

BRIEF FOR RESPONDENT-INTERVENOR HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD

Because the *en banc* ruling of the Court of Appeals that § 2(b) of the Voting Rights Act does not apply to the election of state district judges is correct, Respondent-Intervenor Harris County District Judge Sharolyn Wood ("Judge Wood") respectfully requests that this Court affirm the Fifth Circuit's *en banc* Opinion.

OPINIONS AND JUDGMENT BELOW

Judge Wood incorporates by reference the Houston Lawyers' Association's ("HLA" 's) statement of opinions and judgments below. Brief for Petitioners (hereinafter "HLA Brief") at 1-2. However, she objects to the HLA's

inclusion in the appendix to the HLA's Petition for Writ of Certiorari (hereinafter "Pet. App.") at pp. 305a-308a of a letter from Assistant Attorney General John Dunne, dated November 5, 1990, interposing an objection to the creation of fifteen additional district judgeships in Texas under § 5 of the Voting Rights Act. That opinion letter is not part of the record of this § 2 case.[1]

JURISDICTION

Judge Wood incorporates by reference the HLA's statement of jurisdiction, HLA Brief at 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Judge Wood incorporates by reference the HLA's statement of statutory provisions involved. In addition, this case involves the fourteenth amendment to the United States Constitution, set out in the appendix to Judge Wood's Brief in Opposition to HLA's Petition for Writ of Certiorari (hereinafter "Wood App.") at pp. 5a-6a; the fifteenth amendment, set out in Wood App. at p. 7a; §§ 7 and 7(a)(i) of the Texas Constitution of 1876 set out in Wood App. at pp. 1a-2a; and, collaterally, § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, set out in Wood App. at pp. 3a-4a.

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1. Assistant Attorney General Dunne's letter was part of a proceeding filed by the Mexican American Bar Association to enforce the Justice Department's denial of preclearance. *Mexican American Bar Ass'n of Texas ("MABA") v. State of Texas*, 755 F. Supp. 735, slip op. NO. 90-CA-171, A-90-CA-1018 (W.D. Tex. Dec. 26, 1990) (1990 WL 25231(3)), *pet. cert. filed* (Feb. 27, 1991). A three-judge panel of the Western District of Texas decided that case adversely to MABA on December 26, 1990. A copy of the three-judge panel opinion in *MABA* is reprinted herein at 1a-26a as Judge Wood's Supplemental Appendix ("Wood Supp. App.") to these proceedings.

STATEMENT OF THE CASE

i. Course of Proceedings

This case was brought in the United States District Court for the Western District of Texas, Midland Division, by the League of United Latin American Citizens ("*LULAC*") and certain named black and hispanic individuals. The Plaintiffs, Petitioners in this Court, claimed that Texas' constitutional and statutory system for electing district judges from county-wide districts violated the fourteenth and fifteenth admendments to the United States Constitution, 42 U.S.C. § 1983, and § 2 of the Voting Rights Act by diluting the votes of blacks and/or hispanics in 47 (later reduced to 10) of Texas' most populous counties.

The case was tried to the bench in Midland, Texas, beginning September 18, 1989. On November 8, 1989, the district court issued its Memorandum Opinion and Order (the "Opinion"). The Court rejected the Plaintiffs' constitutional claims but held that Texas' system of electing state district judges diluted the votes of minorities in all target counties in violation of § 2 of the Voting Rights Act.

On January 2, 1990, without a hearing, the district court issued an Order (the "Order") enjoining the calling, holding, supervising and certifying of elections for state district judges under Texas' judicial election system in the target counties and imposed its own Interim Remedial Plan. That Plan, which took effect immediately, on the last day on which filing was permitted for judicial races under Texas law, totally rewrote Texas' comprehensive judicial election system set out in the Texas Government Code and Texas Election Code. It adopted virtually *in*

toto a remedial plan solicited by the district court and agreed upon by the Plaintiffs, HLA and Texas Attorney General Mattox without notice to the Defendant/Intervenors Judge Wood and Dallas County District Judge Harold Entz ("Entz"). The essential feature of that Plan was the assignment of state district judges to legislative districts—two judges to each predominantly Democratic district and one judge to each predominantly Republican district. The primary difference between the district court's Interim Remedial Plan and the Plaintiffs/Mattox's Plan was the substitution of non-partisan elections for partisan elections. Judge Wood strenuously opposed both the Interim Remedial Plan and the Plaintiffs/Mattox's Plan on fourteenth and fifteenth amendment grounds. Defendants appealed both from the injunction under 28 U.S.C. § 1291 and from the November 9 Opinion which the district certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The Fifth Circuit Court of Appeals granted interlocutory review and enjoined imposition of the district court's Interim Plan. Following expedited oral hearing on April 30, 1990, a three-judge panel of the Fifth Circuit Court of Appeals ruled 2 to 1 in favor of the defense. The Court then ordered *en banc* review *sua sponte* and heard oral arguments on June 19, 1990. Of the thirteen judges who decided the case, twelve ruled that vote dilution claims under § 2(b) of the Voting Rights Act does not apply to state district judges.[2] A majority of seven judges, led by Judge Gee, held that the vote dilution provision in § 2(b) of the Voting Rights Act, added to the Act when it was amended by Congress in 1982, applies only to the election of "representatives" and therefore does not

2. The Plaintiffs did not appeal the district court's denial of their constitutional claims.

apply to judicial elections. The Fifth Circuit thus overruled a previous Fifth Circuit panel opinion in *Chisom v. Edwards,* 839 F.2d 1056 (5th Cir.), *cert. denied sub nom. Chisom v. Roemer,* 488 U.S. 955, 109 S. Ct. 390 (1988) which held § 2's vote dilution provisions applied to judicial elections. Five judges, led by Judge Higginbotham, held that § 2(b)'s vote dilution provisions apply to judicial elections in general but do not apply to single-judge trial benches. Only Judge Johnson dissented. On November 20, 1989 the HLA timely filed its Petition for Writ of Certiorari. LULAC filed a Petition for Writ of Certiorari on December 14, 1990. Both petitions were granted on January 18, 1991, and were consolidated for review by this Court.

ii. Statement of Facts

Judge Wood files this Statement of Facts to correct misstatements and misleading statements in the HLA Brief. Judge Wood regrets the length of this Statement but regards it as imperative to correct Petitioners' impression that Texas judicial elections are characterized by blatant discrimination. Petitioners claim that Texas' judicial election system is a numbered post, majority vote, "winner take all" judicial election system (HLA Brief at 8), and they imply that Texas district courts function statewide by reason of statewide jurisdiction (HLA Brief at 7). Contrary to Petitioners' implications, each state district court sits in a single-county or rural multi-county district with venue co-extensive with the electoral district, although jurisdiction technically extends to the State boundaries. Tex. Const. §§ 7 and 7(a)(f), Wood App. at 1a-2a. Moreover, Petitioners' characterization of the judicial election system as a "winner take all" system simply means that only one judge is elected to each bench:

judges do not share the power of their office. The largest vote-getter wins the seat, although, in fact, if more than two candidates run for one bench in the general election only a plurality, not a majority, is required to win. While all Texas district courts are courts of general jurisdiction under the Texas Constitution, the district courts in the larger counties, including Harris County, are either statutorily or by agreement divided into four areas of specialized expertize: civil, criminal, family, and juvenile courts. Thus, district judges in the largest counties expressly run for and are elected to a specific civil, criminal, family, or juvenile specialty bench.

Although Petitioners now acknowledge—as they did not in their Petition—that Texas has a *partisan* judicial election system, Petitioners omit and thus distort the effect of that partisan system on judicial elections. Under Texas' partisan judicial election system, both political parties hold primaries in accordance with the detailed requirements of the Texas Election Code. That Code sets out very detailed and comprehensive election procedures. Candidates of each party run for specific courts; if no candidate receives a majority in the primary, the two leading candidates face each other in a runoff; the winner of each primary or runoff then faces the other parties' candidates in the general election; and the winner of a plurality in the general election occupies the bench for four years. Each bench enjoys county-wide venue, jury selection, and docket equalization, and each judge enjoys independent authority as the sole decision-maker on each case that comes before him or her.

Principally because they ignore the distinctive features of a partisan election system—particularly one in which 97% of all blacks vote a straight Democratic ticket re-

gardless of the race of the candidates—and particularly because they relied almost exclusively on bivariate statistical analysis of selected black/white races as "proof" of discrimination—Petitioners grossly misrepresent the results of Texas state district judge elections.[3] By definition, a "bivariate" analysis takes into account only two variables —the race of the voters and the results of the election. Thus, if the actual cause of electoral results is straight-ticket party voting in which almost all blacks vote Democratic and the Democratic candidate loses, bivariate analysis will call that race racially polarized and, by implication, discriminatory. By then *selectively* analyzing *only* certain contested races in which a black Democrat ran against a white Republican (rather than a black Republican against a white Democrat or a black-supported white or hispanic Democrat against a white Republican) bivariate analysis can give the appearance of discrimination where none, in fact, exists and where it can be proved that statistically significant racial discrimination was not a factor in the race. That is exactly what happened in this case; and that is why Judge Wood has requested remand to consider standard of proof issues should this Court hold that § 2(b) vote dilution claims apply to the judiciary.[4]

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3. At trial HLA presented only claims on behalf of blacks in Harris County, Texas' most populous county, and Judge Wood defended the Texas judicial election system against those claims. Accordingly, the factual and statistical claims about judicial voting patterns in the HLA's brief and in this brief are confined to Harris County.

4. The United States Attorney General also seeks further consideration of facts under the statutory "totality of the circumstances" test as discussed in *Gingles*. Attorney General's *LULAC* Amicus Curiae Brief at 17-28; Attorney General's *Chisom* Brief at 34-35. The difference is that the Attorney General argues this as a reason for remand. Judge Wood seeks affirmance but is concerned that in the event of remand--no matter how unlikely—there be guidance

Relying on the manipulative statistical proof used in this case, Petitioners claim that "[a]lthough the population of Harris County is nearly 20% African American, and African American candidates have run in 17 contested district judge general elections in the County since 1980, only 2 of the African American candidates have won." HLA Brief at 5, 12. Petitioners further claim that white voters "never gave even a bare majority of their votes to an African American candidate," while black voters consistently gave more than 97% of their vote to African American candidates." HLA Brief at 11.

In fact, Petitioners' expert, Dr. Richard Engstrom, analyzed only 17 selected *contested* black/white elections in Harris County *since 1980*. He ignored the three 1978 district judge elections in which blacks ran—and won—contested races against a white candidate. Two of those black judges have run—and won—every four years since 1978. Only one of those four races was contested; therefore, Petitioners counted only that race. In addition, blacks have run in only 22 of the approximately 180 judicial races run in general elections for state district judge in Harris County from 1978 to 1989.[5] The black candidate won 7 of those races—4 contested and 3 uncontested—for a total success rate for black candidates of 32% in all races, and 18% in contested races. *See* Exh. DW-1; R. 242. Moreover, 11 of the 15 losses were attributable to only four candidates: Weldon Berry, Sheila Jackson Lee, Freddie Jackson, and Matthew Plummer. Exh. DW-1. In addition, no black district judge candidate has lost in the Democratic primary since 1984 except those running against other blacks. Exh. DW-2; R. 62. Thus the percentage of black wins is seriously understated by Petitioners.

as to the standard of proof and the political elements that are included within the "totality of the circumstances" under *Whitcomb* and its progeny.

5. The case was tried before the 1990 elections.

An even more egregious distortion is the HLA claim that blacks consistently gave 97% of their votes to black candidates while whites never gave even a majority of their votes to black candidates. In fact, the testimony at trial proved conclusively that black voters consistently gave 97% of their vote to *Democratic* candidates—whether the candidates were black or white. When the black candidate was a *Republican*, the black voters voted 95% against the black candidate and in favor of the white candidate. Since blacks invariably support Democrats, regardless of the candidate's race, and since 58% of Harris County's state district judges are Democrat, black-supported candidates have, in fact, won 58% of the time. Furthermore, the evidence is clear that those candidates could not have won without black support.

In an equally egregious distortion, the HLA claims, "Even straight ticket party voting and candidate incumbency failed to garner significant white votes for African American judicial candidates." HLA Brief at 11. They claim that in 1986 "*all* 16 white Democratic incumbents were re-elected. *All* three African American Democratic incumbents lost." HLA Brief at 11. They then imply that this claimed loss was due to the blacks having appeared in a photograph with white incumbents—making themselves easily identifiable targets of discrimination. HLA Brief at 11, n.13. In fact, *only one* incumbent black Democratic district judge ran (and lost) a contested race in 1986 (newly appointed Judge Matthew Plummer), while two incumbent black judges ran uncontested races and won—Judges Thomas Routt and Jon Peavy. Exh. DW-1.

The defense presented Dr. Delbert Taebel as an expert witness. In contrast to Dr. Engstrom, Dr. Taebel analyzed 41 white/minority judicial races in Harris County since 1980, including primary races, white/Hispanic races, and white/black races, mainly for state district judge. TR. 5-225; State Defendants' ("D") Exh. D-5. Dr. Taebel ran a "multivariate ecological regression analysis," factoring in party affiliation as well as race. He testified that he factored in party and included more races, including primary races, because the purpose of a functional analysis is to determine how the political process works. TR. 5-161-165. Dr. Taebel testified that no one can evaluate partisan elections using a functional approach without taking parties into account because party affiliation overwhelms any other factors in describing how partisan elections work. TR. 5-233.

Dr. Taebel testified that there are two ways to determine whether partisanship or race best describes actual voting patterns. TR. 5-185-186. If the party vote remains similar from race to race in a general election, there is a high degree of partisan voting. TR. 5-186. Also, if there is a shift in white support of a minority candidate between the primary election and the general election, the shift indicates dilution by partisan voting. TR. 5-186-187. The first of these tests shows that in *Harris County party voting by whites, blacks, and hispanics is exactly or almost exactly the same, regardless of the race of the candidates.* TR. 5-227. Also, since black Democrats and white Democrats vote substantially the same in Harris County, TR. 5-268, it follows that under the second of these tests that *any dilution of the vote for a black Democrat between the primary and the general election is due to dilution by Republican votes, not white votes.*

Dr. Taebel testified that Harris County voting is very competitive between Democrats and Republicans and election results are unpredictable.[6] TR. 5-226. There is extensive straight-party voting. TR. 5-183; TR. 5-228. The swing voters, who constitute only 10-20% of the judicial voters, are a critical factor and vote in a variety of different ways. TR. 5-228-229. However, swing voting in Harris County has little or nothing to do with race. TR. 5-232-233. Thus it is simply incorrect as a matter of fact to attribute black losses in judicial races in Harris County to racial bloc voting.

Dr. Taebel's testimony was corroborated by numerous witnesses for both sides who testified to the importance to electoral success or failure in Harris County of specific factors such as straight party voting (TR. 3-220 and 3-325), the Democratic sweep in 1982 (TR. 3-256) and the Republican sweep in 1984 (TR. 3-294, 4-40), the importance of bar poll results in 1986 and 1988 (TR. 3-319, 3-325, 4-56, 5-129), incumbency (TR. 3-325), and the effectiveness of particular campaign strategies (TR. 3-294). Studies commissioned by the Democratic judges in 1986 (including Plaintiff Matthew Plummer), made by Dr. Richard Murray, authenticated by him in deposition testimony, and introduced into evidence by the defense, also rejected racism as the cause of the 1986 loss by three incumbent black judges[7] (only one of whom, Judge Plummer, was a district judge), citing other factors such as their being relatively unknown and unable to raise funds, their concentration on seeking only minority

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6. Except in 1984 when straight ticket Republican judicial voters were sufficiently numerous to win all contested benches—no matter what the race of the Democratic candidate.

7. These are the same three judges discussed by HLA. HLA Brief at 11.

support, low black voting, and their failure to obtain the endorsement of the Gay Political Caucus. TR. 2486-89; Exh. DW 15 at 15-17. In addition, although the HLA presented witnesses who testified that black losses in Harris County campaigns are due to racism, none could point to any racist element in his or her own campaign. *See, e.g.*, testimony of former Judge Weldon Berry, TR. 4-55. Judge Manuel Leal testified that his Republican party affiliation, and not racial voting, caused his loss in 1982. TR. 4-246. Finally, Harris County District Clerk Ray Hardy testified by deposition summary that racism does not play a part in Harris County district judge races and has not done so in at least the last 15 years. TR. 4-255.

Petitioners state that "the district court's findings with respect to racially polarized voting were based on the dramatic results of the experts' analysis." HLA Brief at 10. Petitioners neglect to mention, however, that the district court expressly held that two of the essential elements of a vote dilution claim—political cohesiveness and ability of the white majority usually to defeat the minority's preferred candidate—are proved only by statistical evidence of racially polarized voting, that testimony regarding party affiliation and the actual local factors that determine election outcomes while "credible" is "irrelevant" under controlling law and "legally incompetent" (Pet. App. at 222a-223a) and that "the addition of irrelevant variables [to regression or statistical analysis] distorts the equation and yields results that are indisputably incorrect under § 2." Pet. App. at 287a.[8] Thus the

8. In stating that the addition of irrelevant variables to statistical analysis distorts the equation, the district court was relying on a non-causal, statistical-based standard of proof of vote dilution set out in a minority section of *Thornburg v. Gingles*, 478 U.S. 30, 64, 106

"dramatic results" held by the district court to prove white bloc voting and racially polarized voting were strongly challenged by Judge Wood on appeal, both on evidentiary grounds and on standard of proof grounds.

SUMMARY OF THE ARGUMENT

This case presents three vital questions, each of which has both statutory and Constitutional implications. The vote dilution claims under § 2(b) apply to state judicial elections at all or (2) to the election of judges to independent benches of general jurisdiction. The third (3) asks whether a standard of proof of vote dilution is proper if it excludes as "legally incompetent" virtually all evidence of the actual local factors operative in judicial elections and determines the existence of discrimination solely on the basis of statistical evidence of minority losses. The Fifth Circuit answered both of the first two of these questions affirmatively. Since it held that vote

S. Ct. 2752 (1986), the only case in which this Court has previously interpreted § 2 of the Voting Rights Act.

As the Court is well aware, *Gingles* requires minority plaintiffs to meet an initial threshold burden of proving (1) that the minority is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority is politically cohesive; and (3) that "the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances . . . usually to defeat the preferred candidate of the minority." 478 U.S. at 50-51.

The minority section, Part III-C, in which Justice Brennan endorsed a non-causal statistics-based standard of proof of vote dilution, was expressly rejected by five members of this Court, all of whom expressed concern over its potential for distorting electoral results and/or introducing a proportionality requirement into § 2—in contradiction of both the express wording of the section and its case history and legislative history. *See Gingles*, 478 U.S. 82-83 (White, J., concurring in part and dissenting in part), 478 U.S. 84-105 (O'Connor, J., concurring in the judgment only). Judge Wood treated this subject exhaustively below in her Appellate Brief at 24-39.

dilution claims under § 2(b) do not apply to judicial elections, it failed to reach the third issue. If this Court affirms the Court of Appeals, this issue will have to be resolved later. Respondent Judge Wood therefore urges the Court at least to review, if not to decide, the standard of proof issue.

Petitioners' threshold argument that the inapplicability of § 2 to the judiciary gives states free rein to discriminate in judicial elections is both wrong and disingenuous: this case deals only with vote dilution claims brought under § 2(b) and claiming non-intentional discrimination. Vote dilution claims in judicial elections are beyond the scope of § 2(b) of the Voting Rights Act, which guarantees protected classes the right "to elect representatives of their choice," since judges are not "representatives" within the meaning of § 2(b). Application of § 2(b)'s vote dilution provisions to judicial elections violates fundamental legal rights and principles. Judge Higginbotham's concurrence elaborates upon the special considerations in the election of trial judges that make the equitable and constitutional application of § 2 to such elections impossible. Petitioners' claim that § 2 of the Voting Rights Act must be broadly construed to apply to judicial elections because it is coextensive with § 5 is erroneous. Petitioners' claim that the United States' Attorney General's interpretation of the Voting Rights Act is compelling evidence of the meaning of the Act is also erroneous. Petitioners' essential claim—that protected classes are entitled to proportional representation in the state judiciary—is precluded by the terms of the Act itself. The *en banc* majority opinion of the Fifth Circuit Court of Appeals in this case should, therefore, be affirmed.

ARGUMENT

I. PETITIONERS' THRESHOLD ARGUMENT THAT THE INAPPLICABILITY OF § 2 TO THE JUDICIARY GIVES FREE REIN TO DISCRIMINATE IN JUDICIAL ELECTIONS IS BOTH WRONG AND DISINGENUOUS.

Petitioners' argument is tainted by the prevasive implication that unless this Court declares that § 2 applies to the judiciary, states will be given a free reign to discriminate in judicial elections.[9] This claim is simply false; and the Fifth Circuit *en banc* majority opinion went to great lengths to demonstrate why such inflammatory claims are mistaken.

While Petitioners give the impression that the Fifth Circuit held that § 2 does not ever apply to the judiciary, that is not the case. The Fifth Circuit, in fact, interpreted only part of § 2(b) of the Voting Rights Act, which was added to § 2 when it was amended in 1982.[10] Judge Gee in his majority opinion expressly observed that the court's

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9. *See, e.g.*, HLA Brief at 34 ("If the concurrence's analysis is right, then a state's decision to set up its trial bench specifically to ensure the African-Americans have no say in the process of electing judges would be immunized from attack under § 2").

10. The relevant passage from the Act provides,

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice. . . .

42 U.S.C. § 1973(b) (emphasis added).

inquiry was limited to the question whether the language in § 2(b) prohibiting discriminatory practices in the election of "representatives" could be applied to the judiciary. Pet. App. at 12a. The effect of this limitation, as the Court stated, was to restrict the Fifth Circuit's opinion to a ruling on the issue whether vote dilution claims can be brought in judicial elections. Pet. App. at 28a. As the Court observed,

> Both the broad and general opportunity to participate in the political process and the specific one to elect representatives are . . . treated in the new section. As for the former, protecting it appears to involve all of the primal anti-test, anti-device concerns and prohibition of original Section 2; and its provisions may well extend to all elections whatever, as did they. These broader considerations center on the voter and on his freedom to engage fully and freely in the political process, untrammeled by such devices as literacy tests and poll-taxes. Where judges are selected by means of the ballot, those safeguards may apply as in any other election, a matter not presented for decision today.

Pet. App. at 13a. The court further observed,

> [A]s we have noted, *it is only the application of the results test portion of amended Section 2 to vote dilution claims in judicial elections that is at issue today. Other portions of the section may well apply to such elections*, as may the results test to claims other than those of vote dilution, along with the indubitably applicable Constitutional prohibitions against any intentional act of discrimination in any electoral aspect.

Pet. App. at 28a (emphasis added).

In addition, the Court noted,

> that there can be no doubt whatever that the provisions of the Fourteenth and Fifteenth Amendments, enforceable by means of Section 1983 actions, apply to judicial elections to forbid intentional discrimination in any of them.

Pet. App. at 12a, n.6. The Fifth Circuit's ruling is thus limited to one specific type of discrimination claim—although a very important one—the claim that the votes of a protected class can unintentionally be diluted through a state's structure of its judicial election system, in violation of § 2.

II. VOTE DILUTION CLAIMS IN JUDICIAL ELECTIONS ARE BEYOND THE SCOPE OF § 2(b) OF THE VOTING RIGHTS ACT SINCE JUDGES ARE NOT "REPRESENTATIVES" WITHIN THE MEANING OF § 2(b).[11]

The State of Texas has spoken repeatedly and clearly to the issue of judicial accountability to *all* the voters:

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11. The HLA has taken strategic advantage by incorporating by reference arguments made against the majority opinion in *LULAC* by the Petitioners in *Chisom v. Roemer*, No. 90-747, a separate case consolidated by the Court for oral hearing with this case. Since Respondents sought and obtained the majority opinion in the main action of *this* case (*LULAC v. Clements*, No. 90-974), and since it properly should be argued in *this* case—not *Chisom*—Judge Wood will respond to the arguments against the majority opinion in *LULAC* which were relegated by Petitioners to their *Chisom* Brief and were incorporated by reference only in the HLA Brief. Judge Wood would also point out to the Court that by filing over-long briefs in both cases (62 pages for the HLA Brief and 65 pages for the *Chisom* brief), Petitioners have allowed themselves a combined total of 127 pages of argument to which Respondent Wood is required to reply in 50 pages. Her argument, therefore, necessarily must summarize certain points where Petitioners can allow themselves the luxury of detail.

whenever Texans of all colors have been given the opportunity to express their own preferences they have voted overwhelmingly—both in the legislature and in referenda —for an elected state judiciary in which each judge is responsible to every voter in his judicial district and each district at the trial court level is community-wide, not drawn to serve any one racial group, religious group, or any other special interest. This is Texas' interpretation and implementation of its fundamental state interest in structuring the state judicial system. It is supported both by the traditional concept of the role of judges and judicial systems as distinct from the roles of representatives and representative governmental bodies—such as state legislatures, city councils and school boards—and by fundamental legal principles of federalism, due process, and equal protection.

There is no support in either the plain language interpretation of the terms "representatives" and "judges" or in the legislative history of the 1982 amendments to the Voting Rights Act for Petitioners' claim that judges are "representatives" of racial groups. Indeed, the attempt to force judicial elections to conform to structures established for "representative" government leads to intractable constitutional and practical problems which Petitioners attempt to wish away by arguing superficially that judicial elections are just like all other elections (HLA Brief at 40-45) and that Congress' judgment in providing a mechanism in the Voting Rights Act for remedying discrimination overrides any and all other considerations, including *any* state's interest in even the most fundamental features of its governmental structures (HLA Brief at 45-49).

A. The Plain Language of § 2(b) Restricts Vote Dilution Claims to the Election of "Representatives."

The Fifth Circuit's *en banc* majority opinion below thoroughly analyzed and resoundingly rejected Petitioners' claim that the "plain language" of § 2 requires its application to the judiciary. Pet. App. at 7a-19a. *See* Brief for Petitioners in *Chisom v. Roemer*, No. 90-754 (hereinafter the "*Chisom* Brief") at 27-28; HLA Brief at 21-22. The Fifth Circuit majority began by observing that § 2 should not be pushed beyond its clear language "because of the highly intrusive nature of federal regulation of the means by which states select their own officials." Pet. App. at 3a. Carefully examining the text of § 2(b) and its genesis in *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973), the Court analyzed the background to the 1982 amendments to the Act, paying particular attention to the origin of the results test in legislative redistricting actions and to the traditional (indeed, prior to 1982, the universal) interpretation of the term "representative" by the courts as a term exclusive of the judiciary. Pet. App. at 9a-17a. It concluded that, in revising § 2 in 1982 to incorporate the "results" test promulgated in *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858 (1971) and *White*, Congress intended to extend that test no further than the legislative and executive branches and selected its language carefully to reach that result. Pet. App. at 4a.

Petitioners argue the legislative history of the 1982 amendments to the Voting Rights Act at length. *Chisom* Brief at 32-42. In the short space available to her, Judge Wood cannot replicate their detailed argument. However, she urges the Court to review the same subject as set out

in careful detail in the Fifth Circuit *en banc* majority opinion. Pet. App. at 9a-13c. In addition, Judge Wood would direct the Court to Senate Report 97-417, Congress' official statement of the history and purpose of the 1982 amendments to the Voting Rights Act.

Senate Report No. 97-417 states,

> The objectives of S. 1992 as amended are as follows: (1) to extend the present coverage of the special provisions of the Voting Rights Act, Sections 4, 5, 6, 7 and 8; (2) to amend Section 4(a) of the Act to permit individual jurisdictions to meet a new, broadened standard for termination of coverage by those special provisions, (3) *to amend the language of Section 2 in order to clearly establish the standards intended by Congress for proving a violation* of that section.

S. Rep. No. 417, 97th Cong. 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 178 (emphasis added). Thus, although Congress could have stated that it intended to extend or expand the coverage of § 2, it did not. Instead, it expressly stated that its intent was to *clarify* the standard of proof of a § 2 violation.

Senate Report 97-417 goes on to explain that the amendment to § 2

> is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby *restores* the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden. The amendments also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-Bolden vote dilution case, White v. Regester.*

S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 179. Thus the amendment neither expands nor contracts the scope of § 2; instead, it expressly *restores* the prevailing standard of proof prior to *Bolden* and *codifies* the standard of proof set out by the Supreme Court in *White v. Regester*, a pre-*Bolden* legislative redistricting case.[12]

Given the apparent care taken in the choice of the word "representative" in § 2(b), it makes a mockery of customary canons of statutory construction to argue, as Petitioners do, that this careful specificity should give way to the general definition of the term "voting" in 42 U.S.C. § 1973*l*(c)(1). HLA Brief at 22; *Chisom* Brief at 17-29. First, in regard to the Voting Rights Act generally, Petitioners' interpretation would preclude any limited language in any section of the Act having any effect whatsoever so long as the word "vote" or "voting" was used in the section. In regard specifically to vote dilution claims under § 2, Petitioners' interpretation would have even those "candidates for public or party office" § 2 vote dilution claims cover to which the concept of vote dilution obviously *cannot* apply, such as, for example, candidates for mayor, county superintendent of education, administrator, sheriff or tax collector. It is therefore not true that the "plain language" of § 2 extends to judges

12. *Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490 (1980), had declared that proof of intent to discriminate was necessary to establish a claim under § 2. *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973), established a "results" test of vote dilution claims derived from *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858 (1971).

simply because judges are candidates for public office, as Petitioners claim.

B. Treating Judges as "Representatives" for the Purposes of § 2(b) but Not for Purposes of the Application of the Equal Protection Clause and the One-Person, One-Vote Principle Makes a Mockery of Sound Statutory and Constitutional Construction.

Petitioners claim that "the fact that one-person, one-vote rule does not apply to judicial elections is irrelevant to the application of the Voting Rights Act to the election of judges." HLA Brief at 23; *Chisom* Brief at 43-49. Petitioners allude to this Court's affirmance of *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973).[13] Petitioners have a strong interest in the applicability of the one-person, one-vote principle to judicial elections since many (if not all) of their proposed remedies for vote dilution—including the Interim Plan proposed by Petitioners and adopted by the district court in the instant case—fail to satisfy that principle. *See supra* at 4. Nevertheless, the argument that that fourteenth amendment principle is irrelevant to the interpretation of a statute (§ 2) which derives its validity from the fourteenth and fifteenth amendments is absurd.

In expounding the "plain meaning" of the term "representative," the Fifth Circuit majority paid particular attention to *Wells*. *Wells* held that the one-person, one-vote principle does not apply to the judiciary since,

13. *See Rogers v. Lodge*, 458 U.S. 613, 617, 102 S. Ct. 3272 (1982) (tracing the authority for holding vote dilution claims unconstitutional to the equal protection clause of the fourteenth amendment).

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."

Pet. App. at 18a (quoting *Wells*, 347 F. Supp. at 455-56). The Fifth Circuit stated,

> It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells*, did not concur in that reasoning.

Pet. App. at 19a. Thus, according to the Fifth Circuit *en banc* majority, the very justification for the non-applicability of the one-person, one-vote principle is the non-"representative" nature of the office of a judge.

The Fifth Circuit majority substantiated its conclusion by a thorough analysis of the genesis of the concept of vote dilution in legislative apportionment cases brought under the equal protection clause of the fourteenth amendment. As the majority opinion points out, the concept of *individual* vote dilution was first developed by this Court in the legislative apportionment case of *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964), which provided a standard of measure and a remedy for individual vote dilution by promulgating the doctrine of one-person, one-vote under the constitutional authority of the fourteenth amendment. Pet. App. at 21a. Subsequently, the concept of one-person, one-vote provided the foundation for the

concept of *minority* vote dilution elaborated in *Whitcomb* and *White*. Pet. App. at 21a. Thus, both the general concept of individual vote dilution and the specific concept of minority vote dilution are integrally related to the concept of one-person, one-vote. Moreover, *Thornburg v. Gingles*—the only case in which this Court has reviewed the concept of minority vote dilution since the Voting Rights Act was amended in 1982—presupposes that the one-person, one-vote principle applies to elections covered by § 2 and builds into the test for vote dilution a potential remedy through the use of single member districts in which the aggrieved minority can constitute a majority. *See supra* at footnote 8.

In light of *Reynolds*, *Whitcomb*, *White* and *Gingles*, the Fifth Circuit found itself compelled to conclude that vote dilution analysis can only be meaningful in cases in which the principle of one-person, one-vote applies. Indeed, it correctly observed that without the individual right of one person to one equally-weighted vote there is no standard of appropriate individual vote strength against which to measure alleged dilution; hence a court "can fashion no remedy to redress the non-existent wrong complained of." Pet. App. at 20a-21a. Thus, if a court acknowledges the holding in *Wells* that the one-person, one-vote standard does not apply to the judiciary, it must logically conclude, as the Fifth Circuit did, that "judicial elections cannot be attacked along lines that their processes result in unintentional dilution of the voting strength of minority members." Pet. App. at 20a.

Furthermore, any court which interprets § 2 of the Voting Rights Act must conclude that the one-person, one-vote principle *must* apply to all legitimate claims

within the scope of the Act since a construction of a statute which conflicts with the constitutional principle from which the statute derives its legitimacy is void. *See Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60, 74 (1803). Thus there is only one reasonable interpretation of § 2(b) which reconciles the requirement of the fourteenth amendment that the one-person, one-vote principle apply to vote dilution claims brought under the statute and the holding of this Court that the one-person, one-vote principle does not apply to judicial elections: namely, that judicial elections (like elections to any other non-representative office) fall outside the scope of the vote dilution provision of § 2(b). This interpretation is not only rational but sound in terms of the actual structure of judicial election districts, which serve many legitimate and indeed fundamental concerns having nothing to do with either equally-weighted voting or minority voting rights.

C. The Attempt to Treat Judges As "Representatives" Entails Intractable Practical and Constitutional Problems.

In actuality, the term "representatives" in § 2(b) of the amended Voting Rights Act *cannot* include judges without leading to impractical or unreasonable results which are plainly at odds with Congress' comprehensive civil rights policies. The problem arises because, in fact, judges are *not* "representatives" within the ordinary meaning of the word. Judges do not represent the special interests of any constituency and certainly not the special interests of any racial group. Their function is to administer justice fairly, efficiently and impartially for all, and for that reason judicial districts have never been drawn

in such a way as to give recognition to the special interests of any group of citizens in the community. Instead, in Texas, judicial districts have traditionally been drawn to ensure that all citizens who are likely to come before a court have a say in the election of each one of the court's members. In general, the effort has been to see that jurisdiction, venue, and jury selection extend over a wide enough area to achieve fairness and to minimize forum-shopping and the control of courts by small, tight-knit special interest groups, and yet to provide for efficient administration of case loads.

The function of courts has always been to ensure equal protection under the law and due process for all, and judicial election schemes have been tailored to serve those ends. When judges are held to be "representatives," the interlocking web of jurisdiction, venue, docket control, jury venire, and indeed the accountability of judges to their electorate, is subordinated to the notion that the special interests of minority voters should be given particular attention—even though no one has ever explained what special interests of minority voters require "representation" in the judiciary or in what way the elected judiciary fails to respond to minority interests.[14]

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14. Interestingly, Judge Johnson, the lone dissenter from the *en banc* Fifth Circuit's holding that § 2 does not apply to trial judges, stated in his dissent from the hearing panels' majority opinion:

> When weighing a state's claim that it has a compelling interest in retaining the existing at-large system, courts should keep in mind the common sense notion that the role of judges differs from that of legislative and executive officials. Since it is not the role of judges to "represent" their constituents an examination of the "responsiveness" of the elected official to minority concerns is clearly irrelevant.

Slip op. at 21. The obvious question is how § 2 can be said to apply to the judiciary at all if its most ardent proponents concede that judges do not "represent" their constituents and judges are not elected to be responsive to minority concerns.

The district court in *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), which had been forced by the Fifth Circuit's ruling in *Chisom* (later overruled by *LULAC*) to apply § 2 to the judiciary against its own better judgment, expressed the problem succinctly:

> Although the Court of Appeals squarely held in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), that elections for judicial office are subject to Section 2, it cannot be gainsaid that judicial elections are different from other, particularly legislative, elections. Judicial districts are created, not by reason of population, but for the purpose of the administration of justice in a particular jurisdiction. Judgeships are added, not because of population, but because of caseload. The boundaries of district courts are jurisdictional, not related to population. Judges are charged, not with making legislative or social policy, but with the duty of deciding individual cases according to the law, *even when it is unpopular to do so.*

725 F. Supp. 285, 294 (N.D. La. 1988) (emphasis added). The problem with which that court was wrestling was the constitutionally and administratively insoluble problem of trying to forge a remedy for vote dilution in judicial elections that will both allow minority voters to have the controlling say in the election of a given percentage of judges and at the same time preserve the independence and special non-legislative attributes of the judiciary and the constitutional rights of both voters and litigants.

Judge Wood argued at length in her Fifth Circuit Reply Brief that no court which has been faced with the problem of devising a remedy for perceived vote dilution in judicial elections has been able to reach a satisfactory melding of the concepts of representatives—who serve the special interests of constituencies and, in order to serve those interests fairly, must be elected on a one-man, one-vote basis—and judges—who by definition, do *not* serve special interests and who, to ensure impartiality and accountability to all, are elected at large from districts as wide as the community they serve. She hereby incorporates by reference the argument and authorities cited to that effect in her Reply Brief.[15]

In the case of representatives, the appropriate remedy for vote dilution simply lies in the creation of sub-districts which pose no new constitutional problems, but which rather enforce the Constitution. In the case of judges, the creation of sub-districts necessarily leads to equal protection, due process, jurisdiction, venue, and administrative problems—not because no legislature or court is clever enough to come up with a remedy, but because the notion of judges as "representatives" inherently contradicts the notion of judges as servants of all the people.

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15. *See, e.g., Mallory v. Eyrich*, 717 F. Supp. 540, 542-45 (S.D. Ohio 1989), *motion to dismiss granted*, 898 F.2d 154 (6th Cir. 1990), *on remand from Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988) (emphasizing the intractability of principles of reapportionment under the fourteenth amendment when applied to judicial elections as well as fundamental considerations of the relationship between the federal courts, state legislature, and state constitution); *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 521 (M.D. Ala. 1989) (seriously questioning "the propriety and wisdom of utilizing the Voting Rights Act to restructure judicial election schemes" and invoking the "real possibility that no f[illegible], reasonable, and equitable remedy can ever be fashioned to redress whatever section 2 violations may exist").

III. JUDGE HIGGINBOTHAM'S CONCURRENCE ELABORATES UPON THE SPECIAL CONSIDERATIONS IN THE ELECTION OF TRIAL JUDGES THAT MAKE THE EQUITABLE AND CONSTITUTIONAL APPLICATION OF § 2 IMPOSSIBLE.

Petitioners fundamentally misconstrue the significance of Judge Higginbotham's concurrence in the *en banc* majority judgment below, which, in fact, focuses on the fundamental problems that arise when the concept of vote dilution is applied to non-representative offices such as the office of trial judge.

Petitioners attack the concurrence principally on the ground that it "wrongly focuses on the post-election function of Texas trial judges rather than the fairness of the electoral process." HLA Brief at 25. The HLA distinguishes three other grounds for attacking the concurrence which are all corollaries to their first objection: (1) that the minority opinion improperly creates *per se* rules immunizing electoral practices from scrutiny under § 2; (2) that "it erroneously treats the state's purported interests in maintaining the present system as a threshold question of § 2 coverage, rather than as only one, relatively minor, aspect of the totality of the circumstances test mandated by Congress"; and (3) that "it imports into the liability inquiry an issue more appropriately addressed at the remedy stage." HLA Brief at 25. All objections boil down to one objection: namely that Petitioners would have this Court ignore the trampling upon constitutional rights and fundamental legal principles that occurs when § 2 vote dilution claims are applied to non-representative offices such as the judiciary—a trampling

which Judge Higginbotham's concurrence describes with devastating clarity in the case of trial judges.

Essentially, the Fifth Circuit's five-judge concurring opinion, authored by Judge Higginbotham, emphasizes the impossibility of devising a constitutional remedy for supposed vote dilution in the narrow field of state district judge elections. Although Judge Higginbotham attributed the lack of remedy for perceived vote dilution in district judge elections to the fact that trial judges are sole decision-makers within their districts, rather than to the fact that trial judges are not "representatives" of their constituencies' special interests, Pet. App. at 92a, the broad conclusion reached by the concurring judges is essentially the same as that reached by the majority: application of the concept of vote dilution to an elected state judiciary is inconsistent with fundamental legal concepts and constitutional requirements since the office of judge is essentially a non-representative office.

As Judge Higginbotham points out, each trial judge is an official who exercises his full authority alone and whose authority has its source in an electorate coterminous with the effective jurisdiction of the court, so that there can be no dilution of votes for that sole decision-making office. Pet. App. at 93a. As Judge Higginbotham also acknowledges, the problem of applying the concept of vote dilution to trial judges does not stop there: "the fact that trial judges act singly is also integral to the linking of jurisdiction and elective base." Pet. App. at 93a. While Petitioners make light of the sole-decision-making characteristic of the office of trial judge stressed by the minority opinion, that is one of the key reasons why the office cannot be considered "representative." It is also a key reason why no remedy can be devised for "vote dilution"

in the election of the office since, as the minority opinion points out,

> Subdistricting would not create an equal opportunity for representation in decision-making, for
>
> > [t]here can be no equal opportunity for representation within an office filed by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

Butts v. City of New York, 779 F.2d 141, 148 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021, 106 S. Ct. 3335 (1986). What subdistricting does, rather than provide minorities with representation in all decisions, is to simply allocate judges, and thus judicial decisions, among various population groups. The Voting Rights Act does not authorize such allocation. It cannot be made to authorize allocating judges by simply restating the office of district judge as a shared office or by asserting that the "function" of an office is not relevant. Saying that district judges in fact share a common office that can be subdistricted does not make it so. Nor does the assertion that function is not relevant make sense. Function is relevant to the threshold question of what features of the state arrangement define the office.

Judge Higginbotham points out numerous important interests involved in the structuring of state judicial election systems that would be profoundly affected by the application of the vote dilution principle and Petitioners' preferred remedy—subdistricting—to single-bench judicial districts. For example, in the

larger Texas counties, although district courts are courts of general jurisdiction, some judges are elected specifically to handle only juvenile or family law or criminal cases. Pet. App. at 101a. This structure, like many others created over the decades to accommodate specialized docket needs, geographical considerations, or other reflections of non-racial functional specificity, would be complicated, if not precluded, by the creation of sub-districts designed solely to fulfill minority voter quotas.

As Judge Higginbotham further argues, to break the linkage between jurisdiction and elective base may well *lessen* minority influence instead of increasing it. Pet. App. at 105a. If there be any validity to Petitioners' claim that in some broad sense elected judges are representative of the voters who elect them, in a world of racially and ethnically structured sub-districts, minority voters would have no influence on the election of most judges and, more likely than not, a minority litigant would be assigned to appear before a judge who was not elected from a district with greater than a 50% minority population. Pet. App. at 105a-107a.

Further, requiring subdistricting to correct for vote dilution

> would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not fact of its judicial independence—a core element of a judicial office. Trial judges would still exercise their full authority alone, but that authority would no longer come from the entire electorate within their jurisdictional area. Subdistricting would result in decisions being made for the county as a whole by judges representing only a small fraction of the electorate.

Pet. App. at 108a. Judge Higginbotham concludes that this violence done the system not only would interfere with the state's fundamental right to structure its judiciary without federal interference but it might also retard the goals of the Voting Rights Act itself. Pet. App. at 111a.

The concerns expressed by Judge Higginbotham are not inconsequential considerations lightly arrived at but extremely serious consequences to be reckoned with if the concept of vote dilution under § 2 of the Voting Rights Act is applied to the judiciary in general and to state district judge elections in particular. Respondent Wood and the Fifth Circuit majority would differ from Judge Higginbotham and those judges who concurred with him only by arguing that the violence done to the judiciary by application of § 2 vote dilution principles to those elections stems from an even more radical root than the fact that district judges are sole decision-makers whose authority is coterminous with their electoral base and jurisdiction: it stems from the non-representative nature of the judiciary.

A state judiciary is either elected or appointed, as a state chooses, in order to serve the fundamental state interests of fairness and efficiency in the administration of justice and not at all to serve the special interests of any group of constituents, whether black or white, rich or poor, Jewish or Christian, residents of one neighborhood or residents of another. For that reason it necessarily does radical violence to the concept of an independent state judiciary, as well as to many constitutional and statutory safeguards, to insist that judicial districts be drawn solely to conform to demographic distribution or to insure the proportional representation of minorities in the judiciary (which is ultimately the same thing).

Judges are not representatives of their constituents, and judicial districts should not be structured to insure proportional racial representation.

IV. THE ENFORCEMENT OF § 2(b)'S VOTE DILUTION PROVISIONS IN JUDICIAL ELECTIONS VIOLATES FUNDAMENTAL PRINCIPLES OF FEDERALISM.

One fundamental threshold principle which both the Fifth Circuit and the minority opinion address responds directly to Petitioners' claims that a state's interest in structuring its judiciary should be relegated to "one, relatively minor aspect of the totality of the circumstances test," namely the principle of federalism. Despite Petitioner's claim of triviality, there is an extremely serious question whether the use of the federal courts to force the fundamental restructuring of a state's judiciary violates principles of comity, equity, and federalism set forth in *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746 (1971) and *Burford v. Sun Oil,* 319 U.S. 315, 63 S. Ct. 1098 (1943).

As the Fifth Circuit majority wrote:

> It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed.

Pet. App. at 33a. The minority was completely in accord, writing,

> It would run counter to fundamental concepts of federalism:

> As broad as the congressional enforcement power is [under the fifteenth amendment], it is not unlimited. Specifically, . . . the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.

Oregon v. Mitchell, 400 U.S. 112, 128, 91 S. Ct. 260 (1970).

Since federalism is a fundamental threshold concept, it would obviously violate sound judicial process to relegate this principle to a role as merely *one* minor factor a court may consider in determining whether § 2 has been violated. The principle of federalism actually determines whether the federal courts should enter areas such as the structuring of state judiciaries at all.

V. PETITIONERS' CLAIM THAT § 2 OF THE VOTING RIGHTS ACT MUST BE BROADLY CONSTRUED TO APPLY TO JUDICIAL ELECTIONS BECAUSE § 2 IS COEXTENSIVE WITH § 5 IS ERRONEOUS.

Petitioners make the same fallacious argument for this Court that they made below: (1) this Court has declared that § 5 of the Voting Rights Act requires preclearance of *all* changes in election systems, no matter how minor; (2) this Court has held that § 5 applies to judicial elections; therefore (3) § 2 necessarily applies to judicial elections and turns "*all* action necessary to make a vote effective in *any* primary, special or general election" into actionable discrimination. HLA Brief at 22; *Chisom* Brief at 29-32.

Judge Wood has already rebutted this fallacious argument.[16] Essentially, the fallacies are the following:

Section 5 of the Voting Rights Act requires that certain affected states which historically used discriminatory voting tests or practices seek preclearance from the Justice Department before implementing any "voting qualification or prerequisite to voting, standing, practice or procedure with respect to voting" different from those in effect as of a date supplied by the statute.[17] The Supreme Court has consistently held that § 5 is to be very broadly interpreted to include:

> "Any change affecting voting even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change."

NAACP v. Hampton County Elec. Comm'n, 470 U.S. 166, 179, 105 S. Ct. 1128, 1136 (1985) (quoting 28 C.F.R. § 51.11 (1984)); *see also Dougherty County, Ga. Bd. of Educ. v. White*, 439 U.S. 32, 37, 99 S. Ct. 368, 371 (1978) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 566, 89 S. Ct. 817, 832 (1969), that Congress

16. *See* Judge Wood's Fifth Circuit Post-Submission Brief and Supplemental *En Banc* Brief and her Brief in Opposition to LULAC's Petition for a Writ of Certiorari.

17. The State of Texas was originally excluded from those states which must seek preclearance under § 5. It was brought under § 5 by the 1975 amendment of the Act, which newly defined the term "test or device" to include the use of English-only election materials in jurisdictions where a single language minority group comprised more than 5% of the voting age population, and which extended the Act to those jurisdictions which employed such a "test or device" as of November 1, 1972 and had a voter registration or turnout rate of less than 50%. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Conc. & Admin. News 177, 186.

in enacting § 5 meant "to reach any state enactment which altered the election law of a covered State in even a minor way"). This Court has clearly held that § 5 preclearance procedures reach changes in election procedure with the *potential* for discrimination, regardless of whether those changes *actually* result in the impairment of the right to vote or were intended to have that effect. *NAACP v. Hampton County*, 470 U.S. at 180-181, 105 S. Ct. at 1136-1137; *see also Allen*, 393 U.S. at 569, 89 S. Ct. at 834.

Petitioners erroneously claim that *this Court* has accorded § 2 the same broad scope as § 5, citing *Allen v. State Bd. of Elections*, 393 U.S. at 566-67 (*see Chisom* Brief at 27) and *South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1965) (*see Chisom* Brief at 28). In fact, however, Chief Justice Warren, writing for the Court, expressly stated,

> We emphasize that only some of the many portions of the [Voting Rights] Act [of 1965] are properly before us. South Carolina has not challenged §§ 2 . . . and other miscellaneous provisions having nothing to do with this lawsuit. Judicial review of these sections must await subsequent litigation.

383 U.S. at 316, 86 S. Ct. at 812. Since, as pointed out above, both *Allen* and the later case of *NAACP v. Hampton County* hold that § 5 can be violated even though a proposed electoral change has *no* discriminatory effect at all, § 2—which by its express terms applies only to electoral schemes which *actually result* in impairment of the right to vote or are intended to have such an effect—cannot be coextensive with the scope of § 5. Thus a close reading of *Allen*, *Hampton County*, and *Katzenbach* to-

gether supports the notion that § 2 could have broad scope—if at all—*only* by analogy to § 5.[18] Any such analogy is, however, expressly *precluded* by the clear language of the official legislative history of the 1982 amendments to the Voting Rights Act, S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS 177.

In its official statement for the record of the intended meaning and operation of the 1982 amendments to the Voting Rights Act, Congress expressly stated that an analogy between §§ 2 and 5 of the Voting Rights Act is "fatally flawed for several reasons." S. Rep. No. 417, 97th Cong. 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 177, 219-220. Congress explained that there is a "fundamental difference" between "the degree of jurisdiction needed to sustain the extraordinary nature of preclearance" required by § 5 and "the use of a particular legal standard to prove discrimination" in the courts, as permitted by § 2. S. Rep. No. 417, 97th Cong. 2d Sess. 2, *reprinted in* U.S. CONG. & ADMIN. NEWS at 220. In its view, § 2 was "*less intrusive* on state functions" than § 5, whose preclearance procedures involve "a broad restraint on all state and local voting practices." *Id.* (quoting testimony of Professor Dorsen) (emphasis added). The most fundamental flaw in the analogy is that it ignores the "terms and operation" of § 2, which confine its application to actual racial discrimination and thus "avoid[s] the problem of potential over-inclusion entirely by its own self-limitation." Sen.

18. *Allen* suggests that § 2 also was intended to reach any state enactment which alters election law in even a minor way. 397 U.S. at 566; 89 S. Ct. at 832. However, this language is dictum in a case which is concerned only with the application of § 5 and which expressly finds that § 5 applies in cases in which § 2 could not apply.

Rep. No. 417 at 43, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 221. Unlike § 5, which could completely prohibit a widely used prerequisite to voting, like poll taxes, inconvenient polling places or literacy tests, or which could require minority set-asides, § 2 could only invalidate election laws where discrimination had, in fact, been proved. *Id.*

In other words, in its official statement of the meaning and operation of the 1982 amendments to the Voting Rights Act, S. Rep. 97-417, Congress itself stated that the terms of § 2—at least as amended in 1982—and the operation of that provision only within situations of actual racial discrimination are self-limiting factors built into that provision which absolutely distinguish it from § 5. At the same time, Congress expressed its intent and confidence both that § 2 as amended is "less intrusive" than § 5 and that, as amended in 1982, it *cannot* result in "wholesale invalidation of electoral structures." S. Rep. No. 417 at 35, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 213. The equation of the limited scope of § 2 as amended in 1982 with the broad scope of § 5 and the repudiation by the courts of the very "self-limiting" terms built into the amended section to prevent its use to invalidate whole electoral systems are thus antithetical to the intent of Congress in promulgating the 1982 amendments and to the meaning and purpose of the Act as amended.

In sum, both Supreme Court interpretations of the scope of § 5 and Congress' own official statement of its interest in promulgating the 1982 amendments to the Voting Rights Act compel the conclusion that the scope and function of §§ 5 and 2 of the Voting Rights Act are radically different. Section 5 is prescriptive while § 2 is

remedial and punitive. Section 5 affects *no* extant voting practices or procedures; § 2 is designed to eliminate certain existing discriminatory election practices in specified instances. In one sense the scope and impact of § 5 are much broader than those of § 2, namely in the sense that § 5 applies to *all* voting practices and procedures with the potential for discriminatory results, no matter how minor and no matter of what type; while § 2(b) vote dilution provisions, for example, applies only to elections of representatives from multi-member districts. In another sense, § 2, while it is designed only to correct existing racial discrimination in specific instances, has the potential for a much greater impact on electoral systems, i.e., if it is misapplied to force the wholesale invalidation of electoral systems and the substitution of judicial judgment for the judgment of the citizens as to what their forms of government should be.

The legislative history of the 1982 amendments to the Voting Rights Act makes it clear that Congress never intended the Voting Rights Act to reach and cure all voting inequalities in every electoral system at any cost in terms of the voting rights of the citizenry as a whole or the rights of states to structure their own electoral systems. In particular, Congress was wary of any use of the Act to force the wholesale invalidation and restructuring of state electoral systems by the federal judiciary in the sole interest of maximizing the voting rights of protected minorities. That is why Congress did not extend § 5 of the Voting Rights Act to all jurisdictions, but only to those jurisdictions with a demonstrated history of racial discrimination and low voter registration and turnout. That is also why Congress did not extend § 2(b)

to all electoral practices and systems but only to the election of *representatives* from multi-member districts—elections in which vote dilution can be simply cured by redistricting under the one-man, one-vote principle without destroying the function of the office, invalidating the entire system, or infringing other constitutional rights and guaranties. Finally, that is why Congress included the *proviso* in § 2 which expressly excludes causes of action aimed solely at securing proportional representation of protected minorities in an elected body or which bases its proof on lack of proportional representation—which is precisely the result Appellees seek and which the District Court's opinion mandates.

It is therefore contrary to the meaning and operation of the Voting Rights Act to interpret § 2 and § 5 as jurisdictionally co-extensive and to assign to § 2 the broadest possible scope in order to bring county-wide judicial election systems or any entire judicial election system within its purview. To extend § 2 to judicial elections is not only unwarranted but unnecessary. It ignores not only the protection of § 5 but also the protection of the fourteenth and fifteenth Amendments themselves, which together prevent both potentially discriminatory and intentionally discriminatory judicial election practices.

VI. PETITIONERS' CLAIM THAT THE ATTORNEY GENERAL'S INTERPRETATION OF THE VOTING RIGHTS ACT IS COMPELLING EVIDENCE OF ITS MEANING IS ERRONEOUS.

Finally, Petitioners claim that "interpretation of the Voting Rights Act by the Attorney General is compelling evidence of the Act's meaning." LULAC Brief at 18; HLA Brief at 22; *Chisom* Brief at 33-36. They then cite

to the Attorney General's consistent application of *§ 5* preclearance procedures to the judiciary and to Assistant Attorney General John Dunne's refusal last October, 1990 to preclear the creation of new Texas district court benches on the ground that he personally disagreed with the *en banc* decision of the Fifth Circuit on this *§ 2* case below.

The three-judge panel which decided *MABA* this past December 26, 1990[19] put it best:

> We close by expressing our concern at the actions taken, and the position expressed, by the Attorney General and DOJ in this matter. Texas is within the geographical jurisdiction of the Fifth Circuit. On September 28, 1990, in LULAC, that court, sitting *en banc*, declared, by a margin of 12-1, that section 2 does not apply to at-large, numbered-post, multi-member elections of district judges in Texas. By a margin of 7-6, the court declared that the election of judges, in general, is not within the ambit of section 2.
>
> Despite this plain ruling, the Attorney General, in his letter of November 5, interposed an objection to S.B. 1379 solely on the basis of his contention that "use of the at-large election system [sic] with numbered posts and majority vote results in a clear violation of section 2. . . ." During oral argument in the instant matter, the DOJ has asserted that it does not consider itself bound by the LULAC decision, even as to electoral changes in the three states encompassing the Fifth Circuit.
>
> This position reflects a disturbing disregard for the rule of law. . . .
>
> . . .

19. *See supra* at 13a-14a.

> The orderly administration and enforcement of the Voting Rights Act must be based upon the rule of law, as enacted by Congress and interpreted by the courts. In our dark past, minority rights were abrogated by defiant state officials who refused to accept the rule of law, as declared by the federal courts. That era, fortunately, has passed. We merely observe that the commendable objectives of the Voting Rights Act can be achieved, as well, only through adherence to the orderly, albeit sometimes time-consuming, process of court interpretation, to which the United States, like the states and private parties, is subject.

Wood Supp. App. at 6a-7a. As the three-judge panel stated, the United States is an interested participant in this litigation; it is therefore subject to the rule of law like any other litigant.

VII. PROTECTED CLASSES ARE NOT ENTITLED TO PROPORTIONAL REPRESENTATION IN THE STATE JUDICIARY.

The central issue in this case—the one issue underlying all the preceding issues—is whether § 2(b) of the Voting Rights Act requires states to set aside separate and perhaps even demographically unequal mini-judicial districts in which black voters can ensure the election of black judges who will represent the interests of their constituents in dispensing justice. Petitioners argue that under the system they envision black judges would be accountable to black voters while other judges would be accountable to non-black voters[20] and that a separate but equal

20. This is the problem which so troubled Judge Higginbotham. *See supra* at 32. It is still a problem under the remedial schemes such as cumulative voting which are designed to give minority voters special influence in judicial elections and which Petitioners now suggest might provide an alternative to the minority/minority subdistricting implied as a remedy by *Gingles* and urged by Petitioners below.

black judiciary serving the black community is essential to combat racism and discrimination in the election of black judges. Respondents argue that a separate but equal black judicial system encourages racism and divisiveness; and they would point out to the Court that absolutely no racism or discrimination was proved below. Indeed, the exact opposite was proved: there is *no difference* in the percentage of all votes or black votes received by Democratic candidates: black candidates share the fate of all Democrats whatever their color, subject only to the vagaries of politics. All the Petitioners proved below (even excluding the proven cause of the defeat of black candidates, namely partisan—not racial—voting), was that the percentage of black district judges in the Texas state judiciary falls short of the percentage of blacks in the total population of Texas. They overlook the facts, also proved below, that (using Harris County, Texas as an example) black-supported Democrats constitute 58% of the judges in Harris County;[21] that black judges constitute 5.1% of the state district judges in the county but attorneys constitutionally qualified to run for state district judge[22] are only 3.5% of the total qualified bar;[23] that

21. That fact alone would prove that the white majority does *not* vote sufficiently as a bloc to enable it usually to defeat the preferred candidate of the minority if, as Justice Brennan's minority opinion *Gingles* holds, that preferred candidate need not be minority. 478 U.S. at 68.

22. The Texas Constitution requires that district judges be citizens of the United States, have been practicing lawyers or judges in the State for the four years preceding the election, have resided in the judicial electoral district for two years, and reside in the district during his four year term. Tex. Const. of 1876, art. 7, Wood App. at 1a.

23. Judge Wood contended below that under the legal principle adopted by this Court in analogous Title VII cases, the relevant standard for measuring minority electoral success for an office open

blacks have won all Democratic primary races in which they have run for state judge since 1984; that black candidates have won 32% of all races for district judge in which they have run since 1978, including 18% of all contested races; and that if the black candidate had been elected every single time he or she ran for office (i.e., 22 out of approximately 180 Harris County races since 1978), the percentage of blacks in the Harris County judiciary would still not approach the 18.1% entitlement to district judges benches which Petitioners claim.[24]

The Court should not be misled: Petitioners have not proved *any* racial discrimination in this case as that term is ordinarily understood. At most, they have shown that the percentage of state district judges in Texas falls short of representation proportional to the percentage of blacks in the total Texas population. The shortfall from proportional representation is undisputed. It is also expressly excluded as sufficient or controlling ground for a voter discrimination suit under the terms of § 2 itself, which states as amended:

> The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided, That nothing in this section establishes a right to have members of a protected class*

to only a small percentage of the electorate is the percentage of eligible candidates, not voters. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989) and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989).

24. This fact would remain true even if the eleven races which were run and lost repeatedly by the same four black candidates in Harris County had been run by different people capable of holding office simultaneously.

elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973, reprinted in HLA Brief at 3 (emphasis added).

Thus, even if Petitioners were right on *all* of the other issues before this Court—that judges are "representatives" of their constituents; that fundamental constitutional rights and legal principles would not be affected by the application of the concept of vote dilution to the judiciary or are irrelevant when the enforcement of minority rights is at stake; that § 5 preclearance standards are coextensive with and determinative of impermissible racial discrimination under § 2—and Petitioners are not right on *any* of them—Petitioners would still be seeking by this suit to bring about the very state of affairs precluded by the statute under which they have sued—proportional representation—and they would measure their grievance strictly by this very shortfall from proportionality. To deny that they have such a cause of action is not racist discrimination. It is the recognition that equitable and constitutionally sound judicial election structures are characterized neither by proportionality nor by the representation of interest groups but by their ability to dispense fair and equal justice to all under a system in which each judge is equally accountable to every voter.

CONCLUSION

Therefore, for the foregoing reasons, Respondent Harris County District Judge Sharolyn Wood requests that the Court affirm the *en banc* decision of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

(To be reported at: 755 F.Supp. 735)

(Publication page references are not available for this document.)

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA) (Statewide), et al.,
Plaintiffs,

v.

The STATE OF TEXAS,
Defendant,

and

Faith Johnson, et al.,
Defendant-Intervenors.

UNITED STATES of America,
Plaintiff,

v.

STATE OF TEXAS, et al.,
Defendants.

Nos. MO-90-CA-171, A-90-CA-1018.

United States District Court,
W.D. Texas,
Midland-Odessa Division.

Dec. 26, 1990.

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David R. Richards, Austin, Tex.

Before JERRY E. SMITH, Circuit Judge, LUCIUS D. BUNTON, III, Chief District Judge, and WALTER S. SMITH, Jr., District Judge.

MEMORANDUM OPINION AND ORDER

In this consolidated case we sit as a special three-judge court pursuant to section 5 of the Voting Rights Act of 1965 (the "Act"), 42 U.S.C. § 1973c. The private plaintiffs in one action (No. MO-90-CA-171) and the United States in the other (No. A-90-CA-1018) ask us to enjoin the implementation, or continuing implementation, of certain alleged voting changes affecting the selection of state district judges in several designated counties in Texas. We conclude that as a matter of law the plaintiffs are entitled to no relief.

I.

For the sake of simplicity, we consider the challenged judgeships in two groups: (1) the Travis County judge-

ships and (2) the judgeships in what we will term the "other challenged counties," which include the Texas counties of Dallas, Lubbock, Tarrant, and Victoria. Our basis for denying relief differs between the two groups, as their legal status is dissimilar. As to both groups, the plaintiffs challenge the continuing implementation of county-wide voting for multiple state district judge positions within each of the subject counties. They assert that the at-large election of state district judges is in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

The United States Court of Appeals for the Fifth Circuit recently has held that section 2 does not apply to the election of judges. See *League of United Latin American Citizens Council No. 4434 v. Clements,* 914 F.2d 620, 622 (5th Cir. 1990) (en banc) (overruling *Chisom v. Edwards,* 839 F.2d 1056 (5th Cir.), *cert. denied,* 488 U.S. 955, 109 S. Ct. 390, 102 L.Ed.2d 379 (1988)), *petition for cert. filed sub nom. Houston Lawyers' Ass'n v. Mattox,* 59 U.S.L.W. 3406, ____U.S.____, ____S. Ct.____, ____L.Ed.2d____ (U.S. Nov. 21, 1990) (No. 90-813). Based at least in part, if not entirely, upon its view that it is not bound by that decision (hereinafter *"LULAC"*), the Attorney General of the United States on November 5, 1990, interposed an objection to the implementation of new district judgeships in the other challenged counties. The objection was interposed pursuant to the Attorney General's conclusion that the State of Texas had not carried its burden, under section 5, of showing that the new judgeships would not violate section 2.

A few days earlier, on October 26, 1990, the private plaintiffs had filed the instant complaint in No. MO-90-

CA-171. They assert that the new judgeships in the other challenged counties may not be implemented because, *inter alia*, they have not been precleared, allegedly as required by section 5, either the Attorney General or the United States District Court for the District of Columbia.

Additionally, the private plaintiffs assert that two district judgeships in Travis County have not received preclearance as required. The private plaintiffs seek an injunction proscribing all further elections in Travis County and the other challenged counties until preclearance is obtained.

Following the Attorney General's interposition of an objection as to the other challenged counties on November 5, the United States filed the instant complaint in No. A-90-CA-1018, seeking to enjoin the implementation of the asserted voting changes in the other challenged counties. The United States and the Attorney General now contend, as well, that the Travis County judgeships were subject to preclearance requirements, were not precleared, and now should be submitted for preclearance.

II.

We conclude that creation of the Travis County judgeships at issue here is not subject to the preclearance requirement of section 5. The judgeships in question are the 200th and 201st judicial district court, which were added to Travis County by S.B. 515, which bill was signed by the governor on June 1, 1971, and became effective on August 20, 1971. The bill created the 200th judicial district court effective September 1, 1971, and the 201st effective January 1, 1973.

Section 5 was not applicable to Texas at that time, but the state became a covered jurisdiction on August 6, 1975, by operation of Pub. Law No. 94-73, the 1975 amendments to the Act. Section 204 of the enactment, 89 Stat. 402, added language to section 5 to require preclearance as to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972".

[1] Thus, in order to be a covered change, an electoral change in Texas must be different from one in "force or effect" as of November 1, 1972. S.B. 515 was in effect long before that **date** and has remained unchanged thereafter. The effective **date** of the law, not the **dates** on which the respective judgeships were first filled through appointment or election, are determinative for purposes of section 5.

At least one three-judge voting rights court in Texas has so held. In *Hereford Indep. School Dist. v. Bell,* 454 F.Supp. 143, 145 (N.D. Tex. 1978) (three-judge court), the court explained that preclearance was required for election procedures "enacted after November 1, 1972." [Emphasis added.] The same conclusion was suggested by the Supreme Court in *Briscoe v. Bell,* 432 U.S. 404, 413 n. 12, 97 S. Ct. 2428, 2433 n. 12, 53 L.Ed.2d 439 (1977), which noted that as to Texas, the 1975 amendments established November 1, 1972, as "the precise **date** at which a coverage determination becomes effective, thereby requiring, for example, preclearance of any laws affecting voting rights after that **date**." [Emphasis added.]

The applicable test was enunciated in *City of Lockhart v. United States,* 460 U.S. 125, 103 S. Ct. 998, 74 L.Ed.

2d 863 (1983). The Court observed that in ascertaining whether a change has a proscribed effect, "[t]he proper comparison is between the new system and the system actually in effect on November 1, 1972. . . ." *Id.* at 132, 103 S. Ct. at 1003. Quoting *Perkins v. Matthews,* 400 U.S. 379, 394, 91 S. Ct. 431, 439, 27 L.Ed.2d 476 (1971), the *Lockhart* court noted that " '§ 5's reference to the procedure "in force or effect on November 1, 19[72]," must be taken to mean the procedure that would have been followed if the election had been held on that **date**.' "

Here, the "system actually in effect on November 1, 1972," included the existing 200th and 201st district courts. A judge had been gubernatorily appointed to the 200th court in August 1971, and primary elections were conducted in the spring of 1972. Although the general election was held within a few days after November 1, 1972, absentee balloting was well underway by that date. A judge was gubernatorily appointed to the 201st court in January 1973. The primary and general elections were conducted, respectively, in the spring and fall of 1974.

Under the reasoning in *Perkins,* if a hypothetical election had been conducted for the 200th and 201st courts on November 1, 1972, it would have been conducted under the system in place prior to that **date**, which included the existing two courts in question. Thus, we conclude that the **date** of enactment, rather than the **dates** of the first elections for the respective two courts, is the appropriate **date** by which to determine applicability of section 5.

We also observe that looking to the **date** of enactment is consistent with the posture taken by the Attorney General concerning the questioned judgeships in the other challenged counties. In his letter of November 5, 1990, the Attorney General interposed objection to the changes effected by the enactment of the bill creating those courts. The Attorney General cannot have it both ways: If enactment is the operative event for purposes of the judgeships in the other challenged counties, the same must be true for the Travis County judgeships, as well. Hence, we deny all relief as to the Travis County judgeships.

III.

We conclude that creation of the questioned judgeships in the other challenged counties was precleared by operation of law, assuming arguendo that the creation of new judgeships such as those at issue is subject to section 5's preclearance requirement. The judgeships being challenged herein in the other challenged counties were created by S.B. 1379, which was signed by the governor on June 14, 1989, and established the judgeships effective September 1, 1989. The bill created fifteen judgeships, which are set forth in the margin.[1]

1.

Court	County(ies)	Challenged
363rd	Dallas	Yes
364th	Lubbock	Yes
365th	Dimmitt, Maverick, Zavala	No
366th	Collin	No
367th	Denton	No
368th	Williamson	No
369th	Anderson, Cherokee	No
370th	Hidalgo	No
371st	Tarrant	Yes
372nd	Tarrant	Yes
373rd	Tarrant	No
374th	Tarrant	No
375th	Tarrant	No
376th	Tarrant	No
377th	Victoria	Yes

Section 5 permits a covered jurisdiction, such as Texas, to seek preclearance of electoral changes either by filing a declaratory judgment action in the United States District Court for the District of Columbia or by submitting the changes to the Attorney General. By the specific terms of section 5, a submitted change is deemed precleared as a matter of law if "the Attorney General has not interposed an objection within sixty days after such submission."

The Attorney General has promulgated regulations designed to implement the preclearance contemplated by section 5. See 28 C.F.R. ch. 1 pt. 51, "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended." The regulations reiterate the provision in section 5 that a matter is deemed precleared if not objected to by the Attorney General within sixty days. 28 C.F.R. § 51.1(a)(2) (1990).

During the sixty-day period, the Attorney General may, by letter, request "any omitted information considered necessary for the evaluation of the submission." *Id.* § 51.37(a). Significantly, "[w]hen a submitting authority provides documents and written information materially supplementing a submission . . . , the 60-day period . . . will be calculated from, the receipt of the supplementary information. . . ." *Id.* § 51.39(a) (emphasis added).

[2] The State of Texas asserts that S.B. 1379 was precleared by operation of law in that sixty days had elapsed from its initial submission without either (1) the interposition of an objection or (2) the submission of "materially supplementing" information. We agree and, hence, deny all relief as to the judgeships in the other challenged counties.

For purposes of the present request under § 5 for injunctive relief, only those judgeships marked "Yes" under the "Challenged" column are being questioned by the plaintiffs. The 373rd, 374th, 375th, and 376th courts do not exist, although nominally authorized by S.B. 1379, as the statutory conditions necessary to bring them into existence have not been met.

The state submitted S.B. 1379 to the Attorney General on February 13, 1990; the sixtieth day for interposing an objection was April 16, 1990. During the period between February 13 and April 16, the state provided no additional material, with one exception.

On March 23, following a telephone conversation with an employee of the United States Department of Justice (DOJ), the state telecopied a copy of Tex. Const. art. V, §§ 7 and 7a, to the Voting Rights Section of the Civil Rights Division of the DOJ. Each of those constitutional sections had been precleared by the Attorney General by letter dated October 1, 1985.

By letter dated April 11, the Attorney General's office notified the state that supplemental information had been received and that, consequently, the deadline for objection had been extended to May 22. The letter did not assert that the additional information constituted a material supplement.

Between March 23 and May 22, the state furnished no additional material, with one exception. By letter dated May 16, referencing a telephone conversation with a DOJ employee, the state, by letter to that employee, requested that she consider, in regard to the submission of S.B. 1379, the panel opinion in *LULAC*, 902 F.2d 283 (5th Cir. 1990) (declaring section 2 inapplicable to multi-member, county-wide judgeships), and the then-anticipated en banc opinion (which in fact was issued the following September).

By letter dated May 18, the Attorney General's office notified the state that by virtue of the state's May 16 letter, the deadline for objection had been extended to July 16 (the sixtieth day after May 16). Then, following the en banc oral arguments in *LULAC* that occurred on June 19, 1990, the state, by letter dated July 2, 1990, purported to withdraw its submission of S.B. 1379. Immediately following issuance of the en banc opinion in *LULAC* on September 28, 1990, the state on October 2 resubmitted S.B. 1379 to the Attorney General, requesting preclearance.

We hold that neither the telecopy of March 23, 1990, nor the letter of May 16, 1990, constitutes a material supplemental submission necessary to extend the sixty-day persiod provided to the Attorney General for interposing an objection. If the March 23 telecopy thus did not start the sixty-day period running anew, S.B. 1379 was precleared by operation of law on April 16, 1990. Assuming arguendo that the March 23 telecopy was a material supplemental submission, the sixty-day period nevertheless expired on May 22, as the letter of May 16 was not a material supplemental submission.

[3] The assertion that the telecopying of two sections from the Texas constitution started the sixty-day period running anew is entirely without merit. Those constitutional sections were available as published legal materials in any reasonably complete law library; the DOJ does not argue that it had no easy access to the same. Moreover, the sections had been precleared by the Attorney General several years previously. They were not at issue, directly or indirectly, in the submission of S.B. 1379.

Facts are "material" if they "might affect the outcome . . . under the governing law." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). There is no respect in which the submission to the Attorney General of a copy of readily available provisions, of which the Attorney General was well aware and which already had received the close scrutiny of the preclearance process, possibly could have "affected the outcome" of the submission of S.B. 1379.

Additionally, section 51.39(a) of the regulations, discussed *supra*, requires that in order to re-start the sixty-day period, the new documents must be "materially supplementing" the initial submission. Even assuming arguendo that the documents here were "material," they cannot reasonably be deemed to have "supplemented" the submission of S.B. 1379. As we have observed, the Attorney General already knew of the constitutional sections, had ready access to them, and had precleared them. The mere sending of copies of them to the DOJ did not add to, or supplement, anything.

Finally, section 51.37(a) of the regulations, discussed *supra*, requires that any additional information needed by the Attorney General must be requested "by letter." It is acknowledged that the sections of the Texas constitution, if requested at all, were asked for by telephone. In summary, then, the March 23 telecopy did not trigger a new sixty-day period, and S.B. 1379 was precleared by operation of law on April 16.

[4] Assuming arguendo that a new sixty-day period began running on March 23, it expired on May 22, and the state's letter of May 16 cannot be deemed a "materially supplementing" submission. The May 16 letter merely called the DOJ's attention to the pendency of the

LULAC case. But that information did not "supplement" anything.

As of May 16, the DOJ was participating actively as amicus curiae in *LULAC*, in which oral argument was presented before the Fifth Circuit panel on April 30, within a panel opinion issued on May 11. See *LULAC*, 902 F.2d 293 (5th Cir. 1990). On May 16, the court entered its order granting rehearing en banc in *LULAC*. *See LULAC*, 902 F.2d 322, 323 (5th Cir. 1990). The DOJ participated in briefing and oral argument before the en banc court.

Thus, the DOJ was aware of, and was a part of, every phase of the *LULAC* litigation during the time when S.B. 1379 was under submission. The DOJ was undeniably cognizant of the fact that both *LULAC* and S.B. 1379 involved the question of at-large voting for district judges in Texas. A letter asking the DOJ to consider *LULAC* in reviewing S.B. 1379 thus certainly was not "material" and could not have "supplemented" any information or knowledge that the DOJ or the Attorney General already had.

Accordingly, the mere sending of the May 16 letter did not trigger a new sixty-day period under section 51.39(a). The sixty-day period, even if started anew on March 23, expired on May 22, and consequently, in the alternative, was precleared by operation of law on May 22. The purported withdrawal of the submission on July 2 had no legal effect, as by operation of law the preclearance had already occurred, and the state was free to implement the electoral changes, if any, encompassed by S.B. 1379.

Finally, as to the letter of May 16, we note that the Attorney General apparently never deemed the *LULAC* litigation material, in any event, for purposes of the preclearance of S.B. 1379. That is evident from the fact that, despite the Fifth Circuit's en banc conclusion that section 2 does not apply to the election of judges, the Attorney General, in his letter of November 5 interposing an objection to S.B. 1379, acknowledged the *LULAC* en banc opinion but declined to follow it. Instead, the November 5 letter declares that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2. . . ."

Hence, for this additional reason, the *LULAC* litigation, from the Attorney General's point of view, was not a "material" or "supplemental" submission that, under section 51.39(a), could have triggered a new sixty-day period for the interposition of objections. Therefore, S.B. 1379 has been precleared by operation of law, and thus the prerequisites for an injunction under section 5 have not been satisfied.

IV.

We close by expressing our concern at the actions taken, and the position expressed, by the Attorney General and DOJ in this matter. Texas is within the geographical jurisdiction of the Fifth Circuit. On September 28, 1990, in *LULAC*, that court, sitting en banc, declared, by a margin of 12-1, that section 2 does not apply to at-large, numbered-post, multi-member elections of district judges in Texas. By a margin of 7-6, the court declared that the election of judges, in general, is not within the ambit of section 2.

Despite this plain ruling, the Attorney General, in his letter of November 5, interposed an objection to S.B. 1379 solely on the basis of his contention that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2. . . ." During oral argument in the instant matter, the DOJ has asserted that it does not consider itself bound by the *LULAC* decision, even as to electoral changes in the three states encompassing the Fifth Circuit.

This position reflects a disturbing disregard for the rule of law. The Attorney General is not merely preserving, as an advocate, an issue for possible later resolution by the Supreme Court. Instead, he has taken official action, by interposing an administrative objection, that is based solely upon a ground definitively rejected as the law in the Fifth Circuit. The DOJ participated actively in the *LULAC* litigation and now, having lost, seeks to assert its view by ignoring the law of the circuit.

The aim of the United States here is salutary—to effect the laudable goals of the Act by opposing changes that, in the view of the Attorney General, have the purpose or effect of diminishing the role of minorities in the electoral process. However, as the instant action is brought under the Act, both this court and the Attorney General are limited to the role assigned by Congress in passing the Act.

[5] [6] The circuit court by which this district court is bound (absent Supreme Court directive) has declared that section 2 does not apply to the election of judges. The United States, as a litigant in this court, is bound by that determination. Likewise, it may not wield its administrative sword in this circuit in contravention of

the interpretation of the Act enunciated by the Fifth Circuit (again, absent any intervening declarations by the Supreme Court).[2]

The orderly administration and enforcement of the Voting Rights Act must be based upon the rule of law, as enacted by Congress and interpreted by the courts. In our dark past, minority rights were abrogated by defiant state officials who refused to accept the rule of law, as declared by the federal courts. That era, fortunately, has passed. We merely observe that the commendable objectives of the Voting Rights Act can be achieved, as well, only through adherence to the orderly, albeit sometimes time-consuming, process of court interpretation, to which the United States, like the states and private parties, is subject.

V.

In summary, no preclearance was required for S.B. 515, and S.B. 1379 was precleared by operation of law. Hence, the requirements for injunctive relief under section 5 have not been met.[3] We deny all relief. It is so ordered.

JERRY E. SMITH, Circuit Judge, and WALTER S. SMITH, Jr., District Judge, concur.

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2. We also observe that the result of the Attorney General's position here, if allowed to prevail, is somewhat mixed. One of the challenged judgeships involves a black female elected in 1990 in Dallas County; another challenge, in Tarrant County, would bring about the removal from the bench of an Hispanic male who has served as a state judge for many years.

3. See also Hunter v. City of Monroe, Civ. Ac. No. 90-2031 (W.D. La. Nov. 7, 1990) (three-judge court) (holding that § 5 does not apply to the mere addition of judgeships to an existing judicial structure).

LUCIUS D. BUNTON, Chief District Judge, concurring in part and dissenting in part.

I concur in the part of the majority's opinion that finds the Travis County judgeships, i.e., the 200th and 201st District Courts are not subject to the preclearance requirements of Section 5. I dissent from the part of the opinion that the questioned judgeships in the other challenged counties were precleared by operation of law. This is incorrect, because it is contrary to the facts that were presented to the Court and, further, is incorrect under the law for the reasons hereinafter set forth.

This is an action pursuant to the Voting Rights Act of 1965, 42 U.S.C. 1973c as amended in 1982, 42 U.S.C. Sections 1983 and 1988, and the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, challenging the failure of the State of Texas to preclear, pursuant to the Voting Rights Act, the creation of seven State District Judgeships in Texas.[4] This hearing is limited to consideration of the Voting Rights issue.

Section 5 of the Voting Rights Act provides that whenever a political subdivision seeks to "administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972", it must obtain preclearance either from a United States

4.

363rd	Dallas
364th	Lubbock
371st	Tarrant
372nd	Tarrant
377th	Victoria
200th	Travis
201st	Travis

District Court in the District of Columbia or the Attorney General. If preclearance is sought from the Attorney General and he tenders no objection within sixty days, the submission is precleared by operation of law.[5] However, if the submitting authority provides "supplementary information" for evaluation, the sixty day period is recalculated from receipt of the supplementary information.[6] Texas, as a covered jurisdiction under this section,[7] must seek preclearance of electoral changes in accordance with the section's provisions.

Five of the seven challenged judgeships were created by S.B. 1379,[8] which was passed by the Texas legislature in its 1989 regular session and signed by the Governor on June 14, 1989. Texas submitted S.B. 1379 to the Attorney General for preclearance on February 13, 1990. The Attorney General's deadline for interposing an objection was April 16, 1990. On March 20th, Texas telecopied two sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice ("DOJ") following a telephone conversation with a DOJ employee. Upon receipt of this supplementary information, the Attorney General extended the objection deadline to May 22, 1990

5. See 42 U.S.C. § 1973c.

6. 28 C.F.R. § 51.39(a) (1990).

7. See 28 C.F.R. Pt. 51, Appendix (1990) (Texas has been a "covered jurisdiction" since September 23, 1975).

8. The 200th and 201st District Courts in Travis County were added by S.B. No. 515, which was signed by the Governor on June 1, 1971, and became effective August 30, 1971. Section 1 of the bill created the 200th judicial district effective September 1, 1971, and the 201st effective January 1, 1973.

On May 16, 1990, Texas submitted a letter to the Attorney General requesting that its submission be considered in accordance with the Fifth Circuit's panel decision and anticipated en banc decision in *LULAC Council No. 4434 v. Clements*. Thus, the Attorney General extended the objection deadline to July 16, 1990.

After en banc arguments in *LULAC*, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. Following the en banc decision in *LULAC*, Texas resubmitted S.B. 1379 on October 1, 1990.

On November 5, 1990, the Attorney General interposed its objection to Texas' voting changes promulgated by S.B. 1379, noting that Texas failed to meet its burden of establishing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect.

This Court must determine three main issues: Is Section 5 of the Voting Rights Act applicable to the contested judgeships? If so, did Texas properly obtain preclearance? Finally, if a violaton of Section 5 does exist, what is the appropriate remedy?[9]

Does Section 5 Apply to S.B. 1379?

Yes.

Since September 23, 1975, Texas has been a "covered jurisdiction" under Section 5 of the Voting Rights Act.[10]

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9. See McCain v. LyBrand, 465 U.S. 236, 250, n. 17, 104 S. Ct. 1037, 1046, n. 17, 79 L.Ed.2d 271, 282, n. 17 (1984) ("The only questions in an action alleging a violation of the § 5 preclearance requirement are (1) whether a change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate."); Lockhart v. United States, 460 U.S. 125, 129, n. 3, 103 S. Ct. 998, 1001, n. 3, 74 L.Ed.2d 863 (1983).

10. 28 C.F.R. Pt. 51, Appendix (1990).

The Act requires preclearance when a State seeks to administer any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . .".[11] Notably, this section applies itself to all "voting", and imposes no limitation on who or what is the subject of the voting. In fact, the Supreme Court summarily affirmed two cases which found that judicial elections are submit to the requirements of Section 5.[12] Although Texas argues "that Section 5 does not apply to the changes that are the subject of the plaintiffs' challenge because judicial elections in general are not covered by Section 5",[13] it goes on to add, "Texas understands that this Court is bound by the Supreme Court's summary affirmances in two cases in which these legal arguments were rejected."[14] Thus, Texas does not dispute the applicability of Section 5 in this instance; it merely argues S.B. 1379 has met the preclearance requirements contained in the section.

Did Texas properly obtain preclearance of S.B. 1379 pursuant to Section 5?

No.

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11. See 42 U.S.C. § 1973(c).

12. Brooks v. State Board of Elections, No. CV 288-146, 1988 WL 180759 (S.D. Ga. Dec. 1, 1989), modified (May 29 and June 25, 1990), aff'd mems., ____U.S.____, 111 S. Ct. 288, 112 L.Ed.2d 243, ____U.S.____, 111 S. Ct. 228, 112 L.Ed.2d 243 (1990); Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985), aff'd mem., 477 U.S. 901, 106 S. Ct. 3268, 91 L.Ed.2d 559 (1986) ("We hold the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5.")

13. Texas's Response to Plaintiffs' Motion to Enjoin Elections for Certain Unprecleared Judgeships, p. 13.

14. Id.

Under Section 5, Texas could pursue either of two options in obtaining preclearance of voting changes: Submit its preclearance request to a District Court in the District of Columbia, or submit them to the Attorney General. Texas opted for the latter, and submitted S.B. 1379 for preclearance February 13, 1990. Accordingly, the Attorney General had sixty days, or until April 16, 1990, to interpose an objection.

Within this period (on March 20th), Texas telecopied two sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice. According to 28 C.F.R. § 51.39, submission of "supplementary information" extends the deadline. Thus, the new deadline became May 22, 1990.[15]

Within this new period (on May 16th), Texas submitted supplementary information to the Attorney General in the form of a letter requesting that its preclearance request be considered in accordance with *LULAC*.[16] This resulted in extension of the objection deadline to July 16, 1990.[17]

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15. On April 16, 1990, Texas received the Attorney General's letter notifying Texas that "supplemental information was received on March 23 and 28, 1990." Thus, the deadline was extended to May 22, 1990.

16. On April 16, 1990, Texas received notification from the Attorney General that Texas' submission of supplemental information extended the objection deadline. Thus, when Texas chose to submit its second letter, it was fully aware that submission of supplemental maerials would result in an extension of the existing deadline. Even so, Texas chose to submit the letter.

17. In a letter dated May 18, 1990, the Attorney General notified Texas of the new July 16, 1990 deadline, stating "[w]e received additional supplemental information regarding this submission on May 15 and 16, 1990."

Prior to the July 16th deadline, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. To explain this action, Texas states, "[p]rior to this withdrawal, the 60th day for your response to this submission was July 16, 1990." Texas offers as its reason for withdrawal that "[i]t is thus not certain whether the court will issue its opinion (in *LULAC*) prior to July 16, 1990." Additionally, since a jurisdiction is only permitted to withdraw a submission prior to a final decision by the Attorney General,[18] Texas' actions in requesting and accepting withdrawal affirms its understanding that preclearance had not yet been achieved. Thus, Texas clearly acknowledges both that its preclearance request has not been decided by the Attorney General, and that its submission of "supplementary materials" extended the objection deadline to July 16, 1990. With this, Texas' first attempt at preclearance ended without a decision by the Attorney General.

On October 1, 1990, Texas sent a letter to the Attorney General resubmitting[19] its application for preclearance of S.B. 1379. The language in the letter very clearly states this is a resubmission of Texas' preclearance request, thus beginning another sixty day objection deadline.[20]

On November 5, 1990, which was well within the time frame for submission of objections, the Attorney General

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18. 28 C.F.R. § 51.25(a) (1990).

19. The specific wording in the letter is "This letter is to advise you that the State of Texas is hereby resubmitting its submission of Chapter 632, Senate Bill 1379, 71st Legislature, 1989." The Court sees no ambiguity in the language which would cause Texas to believe it was doing anything other than resubmitting its preclearance request, thus beginning another sixty day objecting period.

20. See 28 C.F.R. § 51.39 (1990).

issued its opinion denying preclearance of S.B. 1379. Texas made no further attempts to obtain preclearance. Accordingly, it is clear that S.B. 1379 simply has not been precleared pursuant to Section 5 of the Voting Rights Act.

What Remedy is Appropriate to Achieve Section 5 Compliance for S.B. 1379?

Preclearance.

To achieve compliance with Section 5, Texas must obtain preclearance of S.B. 1379. "By the very terms of the statute, covered changes in election laws may not be put into effect until they have either been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. Indeed, they are not 'effective as laws until and unless [they are] cleared pursuant to § 5.'"[21] Since the Attorney General refuses preclearance, the only remaining option lies with the United States District Court for the District of Columbia. In my opinion, since Section 5 compliance is lacking, Texas must "institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ."[22] In the interests of justice, preclearance must be sought within sixty days.

This leaves open the status of the unprecleared judgeships during the pendency of this process. The United

21. Haith, supra note 7, at 414.

22. See 42 U.S.C. § 1973c.

States Supreme Court considered this situation in *Berry v. Doles*, 438 U.S. 190, 98 S. Ct. 2692, 57 L.Ed.2d 693 (1978). In that case, the three-judge panel found non-compliance with Section 5, enjoined further enforcement of the relevant statute, and ordered the State of Georgia to seek approval under Section 5 within thirty days. *Id.* at 192, 193, 98 S. Ct. at 2693, 2694. The Court stated, "If approval is obtained, the matter will be at an end." *Id.* at 193, 98 S. Ct. at 2694. I agree that in the interim of the preclearance process, the judges presiding in the 363rd, 364th, and 377th District Courts should continue in the operation of their courts, with full power and authority.[23] Since the newly elected judges to the 371st and 372nd District Courts have not yet taken the oath and initiated proceedings in those Courts, the unprecleared judgeships in Districts 371 and 372 should remain vacant until preclearance is obtained. No affirmative action to certify unprecleared judgeships is appropriate.

In rendering this opinion, I note that I in no way wish to hinder the Legislature's efforts to create additional State District Courts. In fact, I recognize the imperative need for the judgeships created by S.B. 1379. I merely ask, as I must under the law, compliance with Section 5 of the Voting Rights Act.

I write also to commend the Department of Justice and the Attorney General. I do not believe for a minute that intervening in the *LULAC* case before the Fifth Circuit constituted any sort of a waiver on the part of

23. I commend the judges who preside over these Courts for their efforts in reducing the total caseload in their respective areas. I am fully aware that the existence of these Courts is certainly in the best interest of the public, and I in no way wish to impede the progress of State District Judges.

the United States to continue to seek vigorous enforcement of the Voting Rights Act. The Attorney General is not ignoring the en banc decision. He is attempting to comply with the law as the Sixth Circuit has decreed and as he perceives the Voting Rights Act should be interpreted. Certainly, the Department of Justice has more things to do than monitor each Constitutional provision of the fifty states of the United States, each statute passed by those states, and the opinions of each district court and circuit court. All submissions in the case before this Court were relevant and material and, certainly, the State of Texas believed not only that preclearance had to be sought but that preclearance had not been obtained. It is inconceivable to me that the State of Texas would withdraw the submission if they thought as a matter of law or fact that the judgeships had been precleared. It is just as inconceivable to believe that the State would make a resubmission in October of 1990 if it felt that the matter had been precleared many months before. In my opinion, my two judicial bothers who sat with me on this panel are patently wrong.

At the risk of making this opinion too long, I cannot help but believe that the en banc decision in *LULAC* was incorrect. As a District Judge in the Fifth Circuit, I am bound by the en banc opinion, and will abide by it until such time as the Supreme Court reverses the opinion or the Congress makes changes in the Voting Rights Act.

The majority opinion here seeks to salve its conscience by pointing out that two of the judges of the courts involved are minorities. Just because one of the judges is a black female and another a Hispanic male does not make the opinion correct. I have no quarrel with either

of these individuals, and am sure they are both highly qualified and competent judges. The fact remains, however, that the Voting Rights Act does not speak to those holding the office, but rather speaks to the rights of voters. The voters in the respective districts of these two judges are, in my opinion, having their rights under the Act violated.

Shakespeare, in Sonnet 35 reflects my feelings about the current state of the law in the Fifth Circuit when it comes to the Voting Rights Act. He said:

> Roses have thorns, and silver fountains mud;
> Clouds and eclipses stain both moon and sun,
> And loathsome canker lives in sweetest bud.
> All men make faults.

The opinion in *LULAC* is indeed a thorn in the flesh of voters. The silver fountain of Voting Rights does indeed contain mud. This stains both moon and sun and is indeed a sore on one of the sweetest rights guaranteed by our Constitution. In the opinion of this writer, the *LULAC* en banc decision is reminiscent of the infamous *Dred Scott* decision,[24] which deprived many people of their rights and led to our most unfortunate historic conflict

I would hope that the Supreme Court of the United States will recognize this as a most important field of the law that needs their interpretation. It is hard to believe

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24. In Dred Scott v. Sandford, 19 How. 393, 394, 15 L.Ed. 691 (1857) the Supreme Court stated, "The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as salves, he is not a citizen of the state of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court."

that the voters in Mississippi, Louisiana, and Texas are afforded less rights than voters in the States that are in the Sixth Circuit, i.e., Kentucky, Michigan, Ohio, and Tennessee.

If the Supreme Court does not soon give us guidance, some citizens are going to be deprived of their Constitutional and statutory voting rights.

I DISSENT.

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This brief is on behalf of the official-capacity state respondents, referred to collectively as either "the state" or "Texas," and who are: the Attorney General of Texas; the Secretary of State of Texas; and the thirteen members of the Texas Judicial Districts Board, including the Chief Justice of the Supreme Court of Texas as chair of the Board.

OPINIONS BELOW

Together, the "Opinions Below" segments of the briefs for the Houston Lawyers' Association petitioners in No. 90-813 ("HLA") and the League of United Latin American Citizens petitioners in No. 90-974 ("LULAC") accurately list the opinions below, except they omit four district court orders entered between the district court's liability determination and its first remedial order. These four orders modify parts of the liability opinion and may be found in the appendix to the state's Memorandum in Response to Petitions for Certiorari, Resp. App. 1a-7a.

STATEMENT OF THE CASE

The plaintiffs' challenge

LULAC originated this case as a challenge to the election of state district judges -- the trial judges of general jurisdiction in Texas, TEX. CONST. art. 5, § 8 -- in over 200 judicial districts in forty-four counties. By trial, the challenge had narrowed to 172 judicial districts -- and 172 judgeships -- in ten counties. The trial was to a one-judge federal district court.

The racial or language minority group lodging the challenge varied by county, as did the number of judicial districts:[1] (a) Black voters only against the 59 judicial

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[1] The three principal racial and language groupings relevant to this case are Black, Hispanic, and Anglo. "Black" is used in deference to the apparent preference of most Black Americans. *See* N.Y. Times, Jan. 29, 1991, § A, at 19 col. 1 (reporting results of poll of Blacks by Joint Center for Political and

districts in Harris County, the 37 districts in Dallas County, the 23 districts in Tarrant County, and the 8 districts in Jefferson County; (b) Hispanic voters only against the 19 districts in Bexar County and the 13 districts in Travis County; and (c) the combination of Black and Hispanic voters against the 6 districts in Lubbock County,[2] the 4 districts in Ector County, and the 3 districts in Midland County. Statewide, Texas now has 386 state district judges subject to election in 386 judicial districts.[3]

The challengers argued that the Texas system for electing state district judges in the targeted counties violates the United States Constitution and Section 2 of the Voting Rights Act, as amended, 42 USC 1973 (1982). The statutory challenge was brought, tried, and decided

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Economic Studies). "Hispanic" is used to be consistent with most of the demographic data in the case, even though the overwhelming majority of Hispanics in Texas are Mexican-Americans. "Anglo" is used to denote non-Hispanic whites.

2 Only 5 districts coincide with Lubbock County's boundaries. One judicial district, the 72nd, encompasses two counties, Lubbock and Crosby. TEX. GOV'T CODE § 24.174(a). Crosby is a tenth targeted county, even though the record in the case sometimes indicates that nine counties are targeted.

3 Since trial, three new judicial districts have been added in the ten targeted counties, two in Tarrant County, and one in Lubbock County, bringing the number of judicial districts directly involved in this case to 175. Also, four additional district judgeships will be added in Tarrant County if certain preconditions are met at the county level, which would bring the number of Texas state district judges subject to election to 390. This post-trial data is from the record of *Mexican American Bar Ass'n of Texas v. Texas*, 755 F.Supp. 735 (W.D. Tex. 1990) (3-judge court) ("*MABA*"), the private plaintiffs' appeal from which is pending with the Court as No. 90-1352. The *MABA* record also discloses HLA's error in stating that the Attorney General lodged a Section 5 objection to 15 district judgeships created in 1990 Texas legislation. HLA Brief 13 n.15. As he "clarified" in a November 20, 1990, letter, the Attorney General objected to only 9 of the 15 new judgeships. U.S. Br. in *MABA* 6 n.9. The *MABA* district court held that even these nine had been precleared by operation of law.

under the framework for analyzing racial vote dilution challenges to at-large electoral systems established in *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("*Gingles*"). As the Fifth Circuit en banc opinion stated:

> Plaintiffs attacked the Texas laws providing for countywide, at-large election of judges of the trial court of general jurisdiction, asserting that the imposition of a single-member system was necessary to prevent dilution of black and Hispanic voting strength.

Pet. App. 6a.

History and configuration of Texas district courts

Both the use of counties as the basic political unit and the current system of electing district judges have long Texas lineages. County government historically has been the primary governmental unit in Texas since the days of the Texas Revolution in 1836. Tr. 4-138.

As to judicial selection, upon admission to statehood in 1845, the state of Texas retained essentially the same system for appointing district judges to serve in judicial districts that it had as an independent Republic. Guittard, *Court Reform, Texas Style*, 21 SW.L.J. 451, 456 (1967). It moved to elected district judges in 1850 and back to appointed ones in the constitution of 1861. Texas constitutions adopted subsequent to the 1861 constitution, including the current one adopted in 1876, have provided for district judges elected from defined districts. Pet. App. 93a-94a. Since 1907, the defined judicial districts have been contiguous with county boundaries, and there has been only one judge per district. Pet. App. 94a-95a.

Texas district judges are elected from statutorily created judicial districts. *See, e.g.*, TEX. GOV'T CODE § 24.388(a) (creating the 209th Judicial District in Harris

County). The judicial districts must be contiguous with county lines unless, through a thus far untapped exercise of their franchise, county voters authorize a judicial district smaller than a county. TEX. CONST. art. 5, § 7a(i). With the exception of the 72nd district, each judicial district in the targeted counties is coextensive with one county, and state district judges are elected by countywide vote in general elections.

The county also forms the basic venue unit for district courts. TEX. CIV. PRAC. & REM. CODE § 15.001.[4] With the backdrop of the county as the basic electoral and venue unit, the Chief Justice of the Supreme Court of Texas testified about trial judge accountability. His view was that a district judge should not be responsible to the voters of an area any smaller than the one in which the judge exercises primary jurisdiction. Tr. 5-78. *See also* Pet. App. 282a.

Judicial election and eligibility

Texas elects its district judges in partisan races conducted at the same time as other state partisan races.[5] Political parties nominate judicial candidates in general primaries and runoffs. A candidate must receive a majority of the vote to be the party's nominee at the general election. TEX. ELEC. CODE § 172.003. The winner of the plurality of the votes at the general election is elected to the office of district judge. TEX. ELEC. CODE § 2.001. Thus, one set of judicial elections, the party

4 Some Texas venue provisions are mandatory, to the point of being jurisdictional, and some are permissive. *See generally Gambill v. Town of Ponder*, 494 S.W.2d 808, 809-11 (Tex. 1973). Regardless, the county remains the touchstone.

5 HLA mistakenly states that judicial elections are conducted at the same time as municipal elections. HLA Brief 7, 43.

primaries, has a majority vote requirement and the other, the general election, does not.

LULAC and HLA principally targeted general elections, not primary elections. The only party primaries targeted were the Democratic party primaries in Travis and Jefferson counties.[6]

Texas district judges serve four year, unevenly staggered terms. TEX. CONST. art. 5, § 7.[7] The state constitution establishes minimum eligibility requirements for district judges: (a) they must be citizens of the United States and Texas; (b) they must be licensed to practice law in Texas and have been a practicing lawyer or a Texas court judge or both combined for four years at the time of election; and (c) they must reside in the district for two years at the time of election. *Id.* They must be at least twenty-five years old. TEX. GOV'T CODE § 24.001.

The pool of Black and Hispanic lawyers eligible to be district judge is proportionately far smaller than the pool of Black and Hispanic voters eligible to vote for district judge. A trial comparison by county and by the type of voter challenge -- Black, Hispanic, or combined -- reveals the following:[8]

6 The district court's interim remedy did not tailor relief to the type of targeted election (primary or general); instead, it dissolved the distinction by ordering relief sought by no plaintiff: non-partisan judicial elections. J.A. 164a.

7 The district court's stayed interim remedial order illustrates the unevenness of the staggering of terms. Of the then-172 judgeships under challenge, the interim order would have affected 115 judgeships which were open for election in 1990, including 32 of the 37 in Dallas County. J.A. 163a.

8 The eligibility minority lawyer percentages are from a poll whose results are tabulated in Table 2 of State Exh. D-4. The eligible voter percentages are taken from the district court's findings, Pet. App. 200a-208a, adjusted to account for non-citizens who are voting age in Travis, Lubbock, Ector, and Midland counties, which adjustment is derived from LULAC Exh. Tr-18, L-11, E-13, and M-15.

County (Minority)	% Eligible Minority Lawyers	% Eligible Minority Voters
Harris (Black)	3.8	18.2
Dallas (Black)	1.0	16.0
Tarrant (Black)	2.4	10.4
Bexar (Hispanic)	11.4	41.1
Travis (Hispanic)	2.7	13.5
Jefferson (Black)	3.1	24.6
Lubbock (Combined)	5.1	14.9
Ector (Combined)	3.7	16.0
Midland (Combined)	3.4	10.6

With few exceptions, Texas district judge elections are low profile and issueless. District judge races typically appear low on a ballot that already lists more races than most other states. Tr. 5-182.[9] The voters display little knowledge or interest in the comparatively few contested judicial elections. Straight ticket party voting is permitted, and a high percentage of votes are cast for district judges using straight ticket voting.[10] In

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9 Because vacancies are filled by gubernatorial appointment, special elections never occur for district judges. The consequence is that district judge elections always are buried low on a ballot that can include races for President, Vice-President, United States Senate, United States Congress, Governor, Lieutenant Governor, Attorney General, Comptroller, Land Commissioner, Agriculture Commissioner, Railroad Commissioner(s), Supreme Court Justices, Court of Criminal Appeals Justices, State Board of Education member, Court of Appeals Justices, State Senator, State Representative, County Court at Law Judge, Justice of the Peace, County Judge, County Commissioner, County Clerk, District Clerk, County Treasurer, Constable, and other county offices.

10 The district court observed:

> It was brought to the Court's attention that perhaps a majority of the voters in a General Election, and for that matter, in Primary Elections, have no idea of the qualification of a judge for whom they vote. Their vote is cast because a straight ticket is being cast, and a straight ticket includes judicial nominees from a particular political party.

Pet. App. 188a.

Harris County in 1980, for example, a study found that 90% of Republican voters, 89.3% of Democratic voters, and 98% of the voters in predominantly Black precincts cast straight party votes in judicial races. Tr. 5-228.

District court liability decision

The trial court in this case rejected the constitutional claims of LULAC and HLA, finding that the Texas system for electing its district judges is not maintained as a tenuous pretext for discrimination. Pet. App. 283a. It also found that LULAC and HLA had not established intentional racial discrimination in Texas's establishment and maintenance of its judicial election system. Pet. App. 302a. This determination went unappealed.

The trial court did find unintentional racial vote dilution in the challenged judicial districts in all the targeted counties and a consequent violation of the effects, or results, standard of amended Section 2; however, in doing so, it specifically rejected principles of voting rights analysis announced by the Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) ("*Chavis*"). Pet. App. 287a ("[p]arty affiliation is simply irrelevant" in analyzing racial bloc voting patterns); 298a ("not . . . legally competent evidence").[11]

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11 The import of Texas's *Chavis* argument for *Gingles*-style racial polarization analysis is accurately summarized in the district court's liability decision, *see* Pet. App. 286a, which nonetheless is factually skewed by the rejection of *Chavis*. The picture of racially polarized patterns is fundamentally different when viewed from the perspective of *Chavis*-based facts instead of *Chavis*-rejecting facts. The difference when partisan voting patterns are factored into the analysis is illustrated by the situation in Dallas County. There, during the 1980's, Democratic judicial candidates (regardless of their race) lost, and Republican judicial candidates (regardless of their race) won. Tr. 4-99, 4-101, 5-193--5-194 (also noting the one anomaly attributable to the Democratic candidate's name being the same as a longtime local media personality. LULAC's expert acknowledged a stronger association between the party of a judicial candidate and electoral success than between the race of the candidate and

Finally, the district court found Texas district judges to be "sole, independent decision makers," but attached no legal significance to it in light of then-prevailing Fifth Circuit law. Pet. App. 289a n.32.

Fifth Circuit en banc opinions

In its en banc consideration of the case, the Fifth Circuit voted twelve-to-one to reverse the district court and render judgment against LULAC and HLA. By a seven-to-six majority, the court held that the results test of amended Section 2 is inapplicable to judicial elections. Pet. App. 1a-35a.

In a concurring opinion by Judge Higginbotham, five members of the court (one of whom also voted with the majority) adopted the principle that there can be no unintentional vote dilution in elections for officials who are solo decisionmakers holding single-member offices. Pet. App. 90a-114a.

One member of the court, Chief Judge Clark, joined in no other opinions but specially concurred in the result, Pet. App. 36a-46a, reasoning that Texas has a "fundamental right" to choose to have judges elected who serve "the same jurisdictional area as that which defines the electorate," *id.*, 39a, 44a. Judge Johnson alone dissented from the decision to reverse and render judgment, Pet. App. 115a-182a, although he would not have affirmed the interim remedial order's requirement that judicial elections under it be nonpartisan, *id.*, at 163a n.25.

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electoral success. Tr. 2-147. He would prefer to know the party of the candidate over the race of the candidate to predict the outcome of a Dallas County judicial race. Tr. 2-149.

SUMMARY OF ARGUMENT

Coverage

The meaning and reach of the 1982 amendments to section 2 of the Voting Rights Act are the focus of this case; however, the plain meaning of the statute is not the issue to be confronted.

The issue the Court must confront is whether Congress has exercised its authority under the Enforcement Clauses of the Civil War Amendments -- specifically, the Fourteenth and Fifteenth Amendments -- to prohibit state action that does not violate the Constitution standing alone. Congress may not exercise its enforcement authority consistent with the venerable doctrine of judicial review unless it actively employs its special factfinding competence and determines that constitutional guarantees announced by the Court are being underenforced in a particular way in a particular setting.

Congress amended section 2 to institute a statutory effects standard in reaction to *City of Mobile v. Bolden.* One of the principles established by the Bolden plurality was that the original section 2 reached no further than the Constitution.

There is virtual unanimity among the parties that Congress gave virtually no thought to state judicial elections during the amendment process. The Court, however, has conditioned the constitutionality of congressional employment of its enforcement powers under the Fourteenth and Fifteenth Amendments on Congress's doing precisely what it did not do in 1982 with regard to state judges: that is, deliberating carefully over whether the facts and conditions in the states warrant a particular statutory response from Congress.

The state action here is not just any state action; it is Texas's choice about how to select its courts of primary jurisdiction. There is no function more at the core of a state's authority to choose its system of governance than the judicial function. The fundamental nature of federalism is to protect such a core state function, yet the challengers urge upon the Court a reading of the Voting Rights Act which permits federal courts to order a fundamental restructuring of Texas's trial judiciary. Federal and state courts have a long history of independent operation and existence, as well as interdependence, which would be seriously threatened by the authority the challengers would have the Court find in the effects test component of amended section 2.

Springing from the constitutionally-based constraints on congressional action imposed by the doctrine of judicial review and the basic concept of federalism is the principle of statutory construction which requires Congress to clearly and unequivocally express its intention to use its Enforcement Clause powers to permit the compelled restructuring of state judicial selection systems.

There is no clear statement in either amended section 2 or its legislative history of Congress's intent to target state judicial systems in the 1982 amendments to section 2 of the Voting Rights Act. Thus, the effects arm of amended section 2 does not reach state judicial systems.

Solo decisionmaker

Even if the amendments extended the effects test to state judicial systems, Texas's system for electing its district judges does not violate the vote dilution prohibition emoedded in amended section 2. The district judges are solo decisionmakers.

The theoretical concept of vote dilution, amorphous though it be, is inapplicable to at-large systems for electing public officials who function as solo decisionmakers. Other types of section 2 claims might be established, but other types of claims were not lodged here. The case was tried and decided under the *Thornburg v. Gingles* framework, which applies only to at-large vote dilution cases.

At-large vote dilution claims cannot be established against electoral systems electing solo decisionmakers because permitting them would threaten the state's choice of the basic unit to be represented by any given official arm of its government.

Thornburg v. Gingles establishes single member districts as the remedy that must be used as the paradigm in the first step of the liability phase of a vote dilution case. The unit represented by solo decisionmakers is a choice for the state to make. Carving such a unit into single member districts destroys the choice and splinters the state's fundamental political framework when solo decisionmakers are involved, although not when collegial decisionmakers are.

ARGUMENT

I

THE EFFECTS TEST OF AMENDED SECTION 2 DOES NOT APPLY TO STATE JUDICIAL ELECTIONS BECAUSE CONGRESS HAS NOT CLEARLY AND UNEQUIVOCALLY STATED AN INTENT TO EXERCISE ITS ENFORCEMENT CLAUSE POWERS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO REACH STATE JUDICIAL ELECTION SYSTEMS WHICH ARE NOT INTENTIONALLY DISCRIMINATORY

The United States is, in a sense, quite correct in observing that the crucial clue in this case is that "the dog did not bark." U.S. Br. 32., *Chisom v. Roemer*, Nos. 90-757 and 90-1032. The silence is precisely the problem. There *must* be a distinct bark from Congress before it may so fundamentally alter the relationship between the state and federal systems of justice.

The Necessity of a Clear Statement from Congress

The central question is not whether Congress *may* exercise its enforcement authority under section 5 of the Fourteenth Amendment or section 2 of the Fifteenth Amendment to outlaw unintentional racial vote dilution in elected state judicial systems, such as Texas's, which have been determined to be constitutionally maintained.[12] Instead, the question is whether Congress *has* done so. The questions, however, are linked. Answering the second question posed here requires consideration of the basis for an affirmative answer to the first one.

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12 The district court's finding that Texas's district judge election system is constitutional is now unchallenged. *Supra*, at 7.

The linkage between the two questions finds expression in the clear statement rule of statutory construction. In the setting of this case, the rule means that Congress must have clearly and manifestly expressed its intention in amended section 2 or its legislative history to intrude into the sphere of state judicial autonomy by extending section 2 to reach beyond the intent of state action to the effect of state action. Amended section 2's broad antidiscrimination language reveals no such intent, and the legislative history, devoid of even the slightest reference to judicial elections, indicates there was none.

Thus, the clear statement rule, with its roots in constitutional requirements of judicial review and related constraints of federalism, leads to the conclusion that amended section 2 does not cover judicial elections when the effects test is the only basis for liability. After more than a century of arguable constitutional power to do so, Congress in 1982 did not use its enforcement authority under the Fourteenth and Fifteenth Amendments for a fresh intrusion -- through the effects test -- into a core area of state autonomy.

The analysis of why the Court must draw this conclusion, and affirm the judgment of the Fifth Circuit,[13] requires a review of the basis for the clear statement rule in the context of the challenge lodged in this case and a canvass of section 2's development since its inception in 1965, when the original Voting Rights Act ("the Act"), Pub. L. No. 89-110, 79 Stat. 437, was passed.

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13 Texas urges a different ground for affirmance than the one forming the basis for the Fifth Circuit's en banc majority opinion.

Sources of the Clear Statement Rule

The constraints imposed by the doctrine of judicial review and the Enforcement Clauses of the Civil War Amendments

Amended section 2 outlaws state action which this Court has held does not violate either the Fourteenth or Fifteenth Amendment. It outlaws unintentional but effective discrimination, whereas the Constitution outlaws only intentional discrimination.

The original section 2 was "an uncontroversial provision." *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (plurality opinion) ("*Bolden*"). It was the Act's other provisions which "engendered protracted dispute." *Id.* Indeed, in contrast to the "sparse legislative history" of section 2, *id.*, at 60-61, the other provisions received extended congressional attention before passage of the Act, including extended congressional floor debate. *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966) ("*South Carolina*").

The Court did not have section 2 before it in *South Carolina*, though it did remark that the provision "broadly prohibits the use of voting rules to abridge the exercise of the franchise on racial grounds." 383 U.S. at 316; *see also Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969) ("*Allen*"). *Bolden*, though, explained that, however sparse, section 2's legislative history clearly demonstrated that section 2's reach was coextensive with the Fifteenth Amendment. 446 U.S. at 61.[14]

Section 2 was unaffected by the Voting Rights Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; however, Section 206 of the 1975 amendments to the

[14] The original section 2's unexceptionable reach undoubtedly accounts for the spare legislative history.

Act, Pub. L. No. 94-73, 89 Stat. 400, brought language minority citizens within the ambit of section 2. Section 207 of the 1975 amendments defined persons "of Spanish heritage" to be language minority citizens.[15]

The 1975 amendments also contained some confirmation of the accuracy of the *Bolden* plurality's reading of the reach of section 2.[16] Section 402 of the amendments added subsection (e) to Section 14 of the 1965 Act to provide attorney fees to the prevailing party in lawsuits "to enforce the voting guarantees of *the fourteenth or fifteenth amendment*[.]" (emphasis added).[17]

The *Bolden* plurality's conclusion that the Fifteenth Amendment required proof of discriminatory intent in racial vote dilution challenges to at-large electoral systems meant that section 2 also required such proof. Stated another way, *Bolden* meant that the antidiscrimination principle embodied in the original section 2 "added nothing" to preexisting constitutional protections. *Rogers v. Lodge*, 458 U.S. 613, 619 n.6 (1982). Section 2 became a substantive irrelevancy as

[15] The 1975 amendments also brought Texas and its political subdivisions under the Act's preclearance requirements.

[16] See discussion *supra*, about section 2 extending no further than the Constitution.

[17] The attorney fee provision, codified as 42 USC 1973*l*(e), was not amended in 1982, when section 2 was. Thus, Congress has not exercised its enforcement powers under either section 5 of the Fourteenth Amendment or section 2 of the Fifteenth Amendment to extend the attorney fee provision to section 2 cases resting on the effects test to establish liability. Section 14(e), then, does not reach as far as amended section 2. The *Bolden* plurality would seem to compel the conclusion that statutory attorney fees are available only when voting rights liability rests on proof of intentional discrimination -- which this case does not.

long as it and the Fifteenth Amendment remained unchanged.[18]

Congress reacted to *Bolden* by amending section 2. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, § 3. The principal objective of the amendment was to add an effects test as an alternative to the intent test for determining whether the provision had been violated. This partial legislative uncoupling of section 2 from the Constitution, under the authority of the congressional enforcement sections of the Fourteenth and Fifteenth Amendments, breathed life for the first time into the Voting Rights Act's basic antidiscrimination prohibition.

For more than a century, the people through their Constitution had acknowledged the illegality of intentionally discriminatory, race-based state action. As long as the federal declarations of illegality (be they legislative or judicial) were intent-based, the people of the states had consented to federal intrusions into what would otherwise have been constitutionally protected spheres of state autonomy. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (invalidating racially based state constitutional disenfranchisement provision and explaining that "the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment"). With its move from intent to effect as the standard for measuring challenged election systems, Congress introduced a major alteration between the federal government and the states.

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18 Indeed, *Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980) ("*Voter Information Project*"), decided shortly before *Bolden*, is proof of the original section 2's irrelevancy in a case with special pertinence to the issues here: a racial vote dilution challenge to an at-large system for electing judges. Section 2 is not even mentioned in the opinion, which is premised on the Fourteenth and Fifteenth Amendments.

Principles of judicial review established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), however, limit congressional power to alter the Court's determination of the Constitution's reach. In a case concerning section 5 of the Voting Rights Act, the Court upheld Congress's authority under section 2 of the Fifteenth Amendment to prohibit state action that has a discriminatory impact. *City of Rome v. United States*, 446 U.S. 156, 173-78 (1980) ("*City of Rome*").[19] Earlier voting cases addressed at some length the principles governing legislation enacted pursuant to the congressional enforcement provisions of the Fourteenth and Fifteenth Amendments. *See Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, *supra*.

The empirical premise for upholding congressional power in these cases is the superior fact-finding abilities of the legislative body. *See, e.g., Katzenbach v. Morgan*, 384 U.S. at 656 (referring to "specially informed legislative competence"). Justice Brennan's opinion (joined by Justices White and Marshall) in *Oregon v. Mitchell* re-emphasizes the necessity of deference to legislative fact-finding in the judicial review of congressional action under the Enforcement Clauses of the Civil War Amendments. 400 U.S. at 246-50. Justice Black's opinion in the case took a similar view, emphasizing the need for "legislative findings" when Congress seeks to use the Enforcement Clauses to "invade an area preserved to the States." *Id.*, at 130.

This premise about congressional fact-finding competence leads one of the foremost constitutional

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19 In the context of a congressional redistricting challenge, the Court has summarily affirmed the constitutionality of the addition of the effects test to section 2. *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), *aff'g*, 604 F.Supp. 807 (N.D. Miss.) (3-judge court).

scholars to predict that when and if the question of the constitutionality of the 1982 amendments to section 2 comes before the Court for plenary review, the supporters of amended section 2 will seek to uphold it on Congress's "fact-finding abilities" to determine that racially disproportionate effects cloak intent. L. Tribe, AMERICAN CONSTITUTIONAL LAW § 5-14, at 340 (2d ed. 1988). These fact-finding abilities, so critical to the constitutional validity of amended section 2, also are the underpinning for the requirement of a clear statement in connection with the kind of legislation before the Court.

If Congress is to use its specially informed competence at fact-finding to constitutionally justify legislation encroaching on traditional state domains in ways the constitution, standing alone, does not, then it must be concluded that the legislative encroachment has not occurred if the fact-finding ability has not been exercised regarding a given state domain. Otherwise, the legislative activity legitimating the legislative act of intruding into a state domain when the Constitution standing alone has not done it is absent. Its absence deprives the legislative act of its constitutional basis.

Thus, when Congress acts pursuant to its Fourteenth and Fifteenth Amendment enforcement authority, the statute and its relevant legislative history must manifest congressional deliberation over the reason for intruding into the states' domain. Congressional awareness and deliberation, not inadvertence, is a constitutional necessity in this context:

> In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989), quoting *United States v. Bass*, 404 U.S. 336, 349 (1971).

Enforcement legislation pursuant to Congress's constitutional powers under the Civil War Amendments must reflect "a considered decision of the Congress[.]" *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980) (plurality opinion). In this area, at any rate, Congress may not legislate in a vacuum through inattention.

Federalism constraints

The other constraint underpinning the requirement of a clear statement of congressional intent in this arena of activity is related to the one just discussed; however, the emphasis shifts from the federal level to the state level and the particular state domain purportedly targeted by the federal actor. Its origins are kin to the concept of "Our Federalism" explained in Justice Black's sweeping language:

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

Younger v. Harris, 401 U.S. 37, 43 (1971); *see also Trainor v. Hernandez*, 431 U.S. 434, 441 (1977) (stressing the importance of federalism principles, "particularly with the operation of state courts").

The Court's concern that state judicial functions receive special insulation (but not immunity) from federal encroachments finds expression in numerous judicially-developed doctrines. To give federal courts exclusive jurisdiction over a federal cause of action, Congress must affirmatively divest state courts of their presumptively

concurrent jurisdiction. *Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. 1566, 1568 (1990).

To avoid trenching upon basic tenets of comity and federalism, Congress must "clearly manifest" its intent to deprive state court judgments of finality when enacting federal remedial legislation. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 477-78 (1982). To protect the independent role of the state judiciary, the presumption is that Congress would have specifically abolished the doctrine of judicial immunity from damages under 42 USC 1983 if it had intended to do so. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). Even when permitting federal legislation to reach judges without explicitly stating that it was doing so, the Court has been careful to insulate the judicial function from the reach of federal legislation. *See Forrester v. White*, 484 U.S. 219 (1988) (permitting § 1983 damages recovery for gender discrimination from state judge in his capacity as administrator, not judge).

These doctrines undoubtedly spring from crucial role played by state courts in administering justice in an interdependent federal system. State courts, of course, develop doctrines of state law to which federal courts must defer in a variety of ways. Lower federal courts lack the power to review state court decisions. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Even this Court is constitutionally disabled from reviewing state court decisions if they rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Sometimes, federal courts must abstain even from deciding cases within their jurisdiction to await state court resolution of unsettled state law questions. *See, e.g., Askew v. Hargrave*, 401 U.S. 476 (1971). State courts also function alongside the federal courts in deciding questions of federal law. *See, e.g., Stone v.*

Powell, 428 U.S. 465, 493 n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law[,]" citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-44 (1816)).

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) ("*Atlantic Coast Line*"), is an exposition of why the synthesis of these doctrines is the Court's requirement that Congress clearly and manifestly indicate its intent to intrude into state judicial functions before such intrusion may be held to occur. Observing that one of the powers reserved to the states was the maintenance of state judicial systems, the Court stated:

> [F]rom the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other . . . .

398 U.S. at 285-86.

Construing the reach of the Anti-Injunction Act, 28 USC 2283, the Court noted that the act's protection of state courts rested partially on "the fundamental constitutional independence of the States and their courts[.]" *Id.*, at 287. Then, the Court established the standard that must guide the Court in this case is construing amended section 2:

> *Any doubts* as to the propriety of a federal injunction . . . should be resolved in favor or permitting the state courts to proceed in an orderly fashion. . . . The explicit wording of § 2283 itself implies as much, and *the fundamental principle of a dual system of courts leads inevitably to that conclusion.*

398 U.S. at 297 (emphasis added).[20]

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[20] Echoing the *Atlantic Coast Line* principle, a commentator has remarked: "It is difficult to conceive of a state function more integral than dispute resolution

The Court has not receded from these federalism-based principles of statutory construction when federal court impingement on state judicial functions is at issue. *Mitchum v. Foster*, 407 U.S. 225 (1972), held that section 1983 was an exception to the Anti-Injunction Act, but it used the *Atlantic Coast Line* standard. As explained by Chief Justice Rehnquist's plurality opinion in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 634 (1977), the absence of express statutory language in *Mitchum v. Foster* was "cured by the presence of relevant legislative history." There is no such cure in the legislative history of amended section 2.

Clear statement rule: Confluence of Federalism and Judicial Review

Thus, principles of both federalism and judicial review underly the requirement of a clear statement here, a requirement that is at its most intense when the purported federal intrusion is into the core of the state's domain, its judicial system. In amending section 2, Congress clearly intended to extend the effects test to state-level executive and legislative functions. From all that can be discerned from the authoritative sources, the thought of state judicial systems simply did not surface in the collective conscience of Congress.

Legislative history of amended section 2

There is no indication that Congress envisioned the major alteration of outlawing unintentional discriminatory effects to extend to the relationship of the federal government to state judicial systems. More particularly, there is no hint of congressional awareness that it might

through a court system." Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HAST. L.J. 1337, 1349 n.74 (1980).

be fundamentally altering the two-century long coexistence of "two essentially separate legal systems," *Atlantic Coast Line*, 398 U.S. at 286, by empowering one (the federal system) to fundamentally restructure the other (state systems) for unintentionally discriminatory state action.

Nothing in the relevant legislative history suggests that Congress even remotely contemplated judicial elections when it was inserting an effects test into section 2. The Court recognizes the Senate Report accompanying the 1982 amendments as an "authoritative source" for interpretive guidance for section 2. *Gingles*, 478 U.S. at 43 n.7. The report extensively canvasses pre-*Bolden* racial vote dilution case law. Challenges to virtually every conceivable governmental body are listed and discussed: state legislatures; county commissioners; cities; and school boards. All these governmental bodies are either legislative or executive. Nothing is said about judicial elections, and the only reported pre-*Bolden*, pre-amended section 2 judicial vote dilution case, *Voter Information Project*, *supra* note 18, is neither cited nor discussed.[21]

Try as they might, the petitioners and their *amici* can find nothing in the relevant legislative history indicating that Congress contemplated that its 1982

[21] Nor are the pre-*Bolden* cases holding that the one-person one-vote principle is inapplicable to judicial electoral systems, *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972) (3-judge court), *aff'd*, 409 U.S. 1095 (1973), and *Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971) (3-judge court), *aff'd*, 409 U.S. 807 (1972). The Congressional understanding was that the concept of racial vote dilution is linked to the one-person one-vote anti-dilution principle, hence the Senate Report's use of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), which itself linked the two concepts. 485 F.2d at 1303. Thus, Congress's failure to even mention these two Supreme Court summary affirmances further validates a point that seems obvious: Congress was not thinking about judicial elections when it amended section 2.

ensconcement of an effects test into section 2 swept within its scope elected state judges.[22] In fact, their briefs support the very proposition urged here by Texas. They acknowledge that there was not a single reference "anywhere in the legislative history of the 1982 amendments" to any of the pre-1982 amendment cases holding that the one-person one-vote principle is inapplicable to judicial election systems. HLA Br. 41 n.27, *Chisom v. Roemer*.

In an even more significant admission, they also acknowledge that there was only one explicit statement during congressional consideration of the 1982 amendments "regarding the coverage of judicial elections under section 2[.]" *Id.*, 41 n.26. The statement itself is at best an oblique reference to judges, mentioning "judicial districts" in a "cautionary parade of horribles to be found in subcommittee report hostile to the proposed 1982 amendments." Pet. App. 30a.[23] The statement was made by Senator Hatch, a staunch *opponent* of the amendment. It means virtually nothing in discerning the effects arm of amended section 2, because opposition statements carry "relatively little weight" in discerning a statute's meaning. *Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 (1973); *see also Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988).

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22 The legislative history of the 1965 Act and the 1970 and 1975 amendments, even were the petitioners able to find indications of an intent to cover elected judges, say nothing about the intent behind the 1982 amendments and whether the effects test covers judges. The original Act and the two earlier amendments were pre-*Bolden* and, therefore, concerned only the intent standard for section 2. That earlier legislative history, therefore, is irrelevant to the issue currently before the Court.

23 Even a glancing reference to judicial districts does not necessarily constitute a reference to judges. *See* Pet. App. 31a n.14 (in the region covered by the Fifth Circuit, officials such as sheriffs, highway commissioners, district attorneys, and clerks of court are elected from judicial districts).

The only other part of the legislative history with even scant reference to judges is found scattered in oblique references through the extensive congressional hearings. The meager collection of references is in Judge Higginbotham's concurrence. Pet. App. 67a-68a. The little that is there adds nothing. Witness statements in hearings which are not included in official congressional reports (as these were not) are accorded no significance in determining the meaning and reach of a statute. *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986).

Congressional silence and inattention

The watchdog is silent when judges pass by. Congress never focused on judges. It thus did not make the fact findings or give the careful consideration to the consequences of bringing elected judges within the reach of section 2's effects test which is constitutionally demanded in the proper exercise of its enforcement authority under the Fourteenth and Fifteenth Amendments. Instead, it devoted its attention to restoring its view of the pre-*Bolden* case law -- case law that does not include one single statutory vote dilution case involving judges.

A fair reading of this history can only lead to the conclusion that is implicitly suggested by the recent flowering of judicial vote dilution challenges. Congress never seriously thought about judges when it was amending section 2, and never having seriously thought about the matter, it did not intend to cover it. Judicial elections simply never surfaced as a congressional concern in this delicate and contentious area of the law.[24]

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24 That Congressionally-ordained intrusive restructurings of state judicial selection methods are strange paths hidden from notice by Congressional travelers is illustrated by a consideration of the status of non-elective state judicial systems. The Fourteenth Amendment proscribes intentional racial discrimination in the *appointment* of state judges, as well as in the *election* of

The Unjoined Debate on Judicial Coverage

Had Congress thought about it, there would have been much to discuss in connection with whether the effects test for racial discrimination in voting should be extended to elected state judicial systems. The absence of *any* discussion of *any* of these points is mute, and therefore compelling, testimony to the absence of congressional intent to extend amended section 2 to elected judges.

No prior decisional guidance on the effects test and judges

To support the decision to add a results test to section 2, the authoritative Senate Report stated:

> The "results" test to be codified in Section 2 is a well defined standard, first enunciated by the Supreme Court and followed in numerous lower federal court decisions. This test will provide ample guidance to federal courts when they are called upon to review the validity of election laws and procedures challenged under Section 2.

S. Rep. No. 97-417, p. 16 (1982). Judicial elections *are* different and the role played by those elected in them is fundamentally different than the kinds of elections and elected officials to which racial vote dilution principles had been applied when the 1982 amendments were passed.

The only racial vote dilution case involving judges, completely unnoticed by Congress in 1982 (or any other time, for that matter), *Voter Information Project*, was on

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state judges, but Congress never has exercised its enforcement powers under section 5 of the amendment to statutorily prohibit such actions.

its face an intentional discrimination case and came to the Fifth Circuit on upon the grant of a motion to dismiss. Thus, there had been no factual test of such a case in the courts by the time Congress acted, and its confidence in the standard having been "well defined" would not have been so strong, had it thought about judges and how they are different.

Envisioning the debate that would have occurred had Congress been concerned about judges adds confidence to the conclusion that the coverage is not there. The major elements of the debate that never occurred are canvassed below.

The troublesome inapplicability of one-person, one-vote

The inapplicability of the one-person one-vote principle in judicial elections would have given Congress pause. The standard for evaluating a vote dilution challenge using the effects test is not apparent when the one-person one-vote principle is inapplicable. As Justice O'Connor analyzed it in *Gingles*:

> In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of "undiluted" minority voting strength.

478 U.S. at 88 (J. O'Connor, concurring).

The yardstick adopted in *Gingles* -- a calculation of the minority's potential voting strength in a single-member district -- assumes the applicability of the one-person one-vote rule and that each district has approximately the same population. 478 U.S. at 50-51 n.17, 89-90. Otherwise, the Court would have no articulable standard. The majority opinion below found this a persuasive argument for not applying the amended

section 2 effects test to judicial elections. Pet. App. 20a-23a. Whether Congress would agree is, up to this point anyway, unknown.

The implications of a different eligible pool for judges

Judicial candidates typically must meet more onerous eligibility requirements than other types of candidates for public office. They must in Texas. *Supra* at 5. Such requirements for judges skew the proportions between the eligible pool of candidates and the eligible pool of voters to a dramatically different degree than exist for other public offices. *See* table, *supra* at 6.[25] In other statutory settings, the Court has interpreted congressional legislation to require lower courts to take eligible pool differentials into account. *See, e.g., Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115, 2121-22 (1989) (Title VII employment case). Whether Congress would adjust the effects test standard to account for this difference with judges is unknown and undebated.[26]

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25 A recent social science article examining the underrepresentation of minorities in the judiciary concludes that the best indicator of the number of minority judges, both Black and Hispanic, on the bench is not the selection method; it is the number of minority lawyers in the area. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCIENCE Q. 315 (June 1990).

26 The United States acknowledges the force of this kind of argument about the uniqueness of courts, terming the uniqueness argument "a powerful one." U.S. Br. 34, *Chisom v. Roemer*. It then relegates the concerns it raises to section 2(b)'s "totality of the circumstances" which the courts must consider in determining whether a violation has been established. There is not the slightest indication that such was Congress's intention, and, assuming that Congress properly exercised its constitutional enforcement authority by specifically addressing the circumstances it wished to legislatively correct, there is not the slightest indication that it did so. That is, it did not address the uniqueness of courts and make that uniqueness part of the totality of the circumstances to be considered; it simply did not address the matter at all.

Judicial independence and alternative voting mechanisms

HLA struggles mightily to finesse a concern about judicial independence and respect for basic state choices which arises in connection with the preferred section 2 remedy -- single member districts. It posits alternative voting mechanisms -- at-large cumulative and limited voting mechanisms -- that the court (or the parties) might use if the remedy stage of a vote dilution case were reached. HLA Br. 57-60.[27] HLA's concern is legitimate, and its solution may be a creative, useful one. It just happens, though, that Congress never thought about it, and Texas election law does not contemplate it. In amending section 2 in 1982, Congress left completely untouched this Court's stated preference for single-member districts as the court-ordered remedy for vote dilution violations, absent unusual circumstances. *See East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 639-40 (1976).

No court has ever upheld a trial-court imposed remedy of cumulative or limited voting in a vote dilution case. The only reported case in which such a court-ordered alternative remedy was imposed culminated in appellate reversal. *See McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988) (rejecting district court-imposed limited voting remedy in at-large racial vote dilution case, in part because of its inconsistency with section 2(b)'s proviso disclaiming a section 2 right to proportional representation, *id.*, at 119-20).

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27 Even with the use of such alternative mechanisms in Harris County, smaller-than-countywide judicial districts or subdistricts would have been necessary.

Thus, while HLA's alternative remedy proposal may be one that Congress should consider in connection with determining whether and how judicial elections should be brought within section 2's coverage, it is not one that Congress has considered. Instead, it amended section 2 against a backdrop that included the strong single-member remedial preference, and nothing in the legislative history called the preference into question.

Constitutional freedom to appoint, instead of elect, judges

The Fifth Circuit concluded that the effects arm of amended section 2 does not reach elected state judges "for the cardinal reason that judges need not be elected at all[.]" Pet. App. 2a-3a. This rationale, in turn, rested on the court's view that an appointive state judiciary is permissible notwithstanding the guarantee in Article 4, Section 4, of the United States Constitution of a "Republican Form of Government" to the states. Pet. App. 25a-26a n.13.

Effective denial of state freedom to restructure its judiciary

Another region unexplored by congressional consideration and debate is the practical impediments section 2 "effects" coverage of judges might place on the states' otherwise wide-ranging choice of judicial selection methods. In Texas, for example, the practical result of section 2 "effects" coverage and the district court's factual analysis would be that Texas is effectively foreclosed in the foreseeable future from choosing on its own to move from an elective to an appointive judicial selection system. As chronicled in the record of the *MABA* appeal now pending before the Court on a jurisdictional statement, the United States attempted to prohibit even

the addition of new judgeships to the existing system. The principal reason it offered was that the existing structure violated section 2.[28] *Allen, supra*, made clear that section 5 of the Act covered a change in the nature of an office from elective to appointive, necessitating the Act's preclearance procedures.

Given the views articulated by the United States in *MABA*, it is clear that Texas would be unable to choose to select its judges through appointment because the United States would never preclear the choice, even though it is a constitutionally permissible one. Congress has never confronted the ramifications of this result, which, given Article 4, Section 4, of the Constitution, appears to be unique to state judiciaries.

Thus, Congress has never debated: first, the consequence of permitting federal courts, based on unintentionally discriminatory state action, to compel through section 2 the restructuring of state judiciaries; and, second, the ensuing consequence of prohibiting through section 5 the states' independent efforts to restructure their own judiciaries in otherwise constitutionally permissible ways. The subject is worthy of debate, and it is predictable that one would have been engendered -- had the subject crossed Congress's mind.

The relationship of 3-judge courts to judicial election challenges

Finally, because Congress never considered whether it was reaching judicial elections through amended section 2, it also never considered whether it should expand its three-judge court requirements to cover

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28 The United States even took the remarkable view that it was not bound, even in Texas, by the Fifth Circuit judgment on section 2's reach which is before the Court in this case. See Pet. App. 307a.

challenges to statewide judicial districting. Under 28 USC 2284(a), a three-judge court must be convened "when an action is filed challenging . . . the apportionment of any statewide *legislative* body." (Emphasis added). The district court in *Gingles* was a three-judge court, 478 U.S. at 35, but the one here was not. Yet, the statewide impact here was just as great, and the affected state institution at least as significant -- if not more so, from a federalism perspective. When Congress contracted the number of circumstances requiring three-judge courts, *see* 90 Stat. 1119, it retained § 2284(a) because the circumstances listed there "are of such importance[.]" S. Rep. No. 94-204, p. 9 (1975).

State district judges do not fit neatly into any of the categories on either side of the divide between three-judge court and one-judge court bodies, but in at least one respect, they fit the description of the kind of body intended to be covered by § 2284(a): even one district court sometimes "exercises its powers over the entire State,"[29] which is the Senate Report's specified condition requiring a three-judge court. *Id.* While Texas does not contend here that the federal trial court in this case lacked jurisdiction because it acted through one judge instead of three, it does seem that Congress would at least have taken note of the potential three-judge court implications of covering judges through amended section 2 had it intended to do so.

The need for unobstructed congressional debate

29 The Supreme Court of Texas invalidated Texas's system of school finance. *See, e.g., Edgewood I.S.D. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). The presiding trial judge, a Travis County district judge, has announced his intention to decide by April 15, 1991, whether to cutoff all state and local funds to public schools in Texas because of the state's failure to bring the school finance system into compliance with the Texas Constitution. *See* Dallas Morning News, April 2, 1991, § A, at 1 col. 4.

Congressional reaction to the foregone debate is unknowable, but that is not the point of reciting what Congress did not do. Each of the topics raises policy implications that one side or the other in this case tries to convert to its advantage in arguing whether the effects test in amended section 2 covers judicial elections. The arguments on these points are in reality arguments over whether the effects test *should* cover judicial elections. The Court should not have to forge these difficult policy debates into debates about the meaning of amended section 2 in the context of judicial elections. Instead, it should forthrightly confront them for what they are: indicators of what Congress would have confronted had it intended to address whether elected judicial systems should be subjected to the effects test. Congress's failure to confront them is yet another demonstration that it had no intention of reaching judicial elections through the effects route.

Inapplicability of the Section 5 Analogy

HLA, LULAC, and the Unites States try to buttress their section 2 coverage arguments by pointing to section 5. They argue that it undeniably covers judicial elections, that it must be read in tandem with section 2,[30] and that therefore section 2 also covers judicial elections.

The first and obvious response is that the provisions are different provisions, with different origins, different applications, and different repercussions. Section 5, for example, has included an effects test since the passage of the original Act in 1965. Thus, whether the application of the clear statement rule for judges to section 5 would

30 There is irony in this argument about the tandem nature of sections 2 and 5, given the United States' trial court position in *MABA* that section 5's prohibitions stand independent of court determinations of the reach of section 2.

yield the same result -- that is, no "effects" coverage -- as the one yielded for amended section 2 would require an extensive review of the legislative history behind the original Act. Because the question of section 5's coverage of judicial elections is not before the Court in this case, such a review is unnecessary. It can await the appropriate case.

The Court's summary affirmances in section 5 cases involving elected state judges[31] do not by any stretch of statutory construction and application of precedent lead to the ineluctable conclusion that the "effects" arm of amended section 2 covers judges. As summary affirmances, they are authority only for a rejection of "the specific challenges presented in the .statement of jurisdiction." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Only the judgment of the court below is affirmed. *Anderson v. Celebrezze*, 460 U.S. 780 n.5 (1983). Thus, *Brooks* and *Haith* may have rested on assessments of whether the record below supported a finding of intentional discrimination. They could not have rested on opinions about whether the clear statement rule had been satisfied in the 1965 enactment of Section 5 and its supporting legislative history because the question was not directly presented to the Court in the jurisdictional statements.

The Court must evaluate the reach of section 2's effects test on its own terms, not on section 5's terms. The Court must look to congressional intent concerning section 2 in 1982, not to congressional intent concerning section 5 in 1965. There is time enough to evaluate section 5's reach, and the principles adopted in this case

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31 *Georgia State Board of Elections v. Brooks*, Civ. No. 288-146 (S.D. Ga. 1989), *aff'd*, 111 S.Ct. 288 (1990) ("*Brooks*"); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) ("*Haith*").

should provide at least broad guidance in conducting that evaluation.

Other Protections for Minority Voters in Judicial Elections

Application of the clear statement rule to hold that the effects test of amended section 2 does not apply to state judicial elections would not leave minority voters unprotected in the exercise of their franchise in judicial elections. First, and most obviously, Congress could react to the ruling just as swiftly as it did to *Bolden*. With this scenario, Congress could debate and enact standards in advance of any challenge to elected judicial systems, instead of this Court having to impose them after the trial is over, with virtually no guidance from Congress on how to treat the conceded uniqueness of state judiciaries.

In the meantime, both the Constitution and the Voting Rights Act would continue to offer significant protections to minority voters in judicial elections. The Fourteenth and Fifteenth Amendments, as well as the intent prong of amended section 2, still would prohibit intentional acts of official racial discrimination against those seeking to exercise their franchise in judicial elections. The Act retains major protections for those seeking to exercise their franchise when electing judges. These protections include ballot access, inhibitions on the reinstitution of the poll tax, and preclearance of various electoral changes, including (while *Haith* and *Brooks* remain governing authority) those changes affecting judicial elections.

Conclusion: The Insufficiency of Congressional Inadvertence

The Court has applied the clear statement rule to deny extraterritorial application to a federal antidiscrimination statute whose broad terms otherwise would have reached that far. *EEOC v. Arabian American*

Oil Co., __ U.S. __ (March 26, 1991) (No. 89-1838) ("*Aramco*"). The Court held that Title VII did not regulate the employment practices of United States employers employing United States citizens abroad.

The clear statement rule, which determined *Aramco's* result, is employed "to protect against unintended clashes between [American] laws and those of others nations which could result in international discord." __ U.S. at __, slip op. at 3. Texas seeks no more than the application in this case of the analogue of the *Aramco* principle. Surely it is as important to prevent *unintended* clashes between federal laws and core state functions as it is to prevent such clashes between American laws and the laws of Saudi Arabia. In fact, there is an even stronger constitutional basis for regulating unintended clashes between federal and state governments, as the discussion above indicates.

Congressional inadvertence may not be the basis for radically and irretrievably restructuring a state judicial system that is more than a century old. Governing statutory construction principles, grounded in fundamental precepts of judicial review and federalism, require conscious congressional choice here. The choice ultimately may be for Congress to do precisely what the petitioners seek, but it must be a choice Congress confronts, not avoids. Congressional silence thus far on the question presented here means that the answer to the question must be that the effects test of amended section 2 does not apply to elected state judicial systems.

II.

TEXAS DISTRICT JUDGES HOLD SINGLE-MEMBER OFFICES, AND ELECTING THEM COUNTYWIDE IS NOT A DILUTIVE ELECTORAL PRACTICE COVERED BY AMENDED SECTION 2

This case was brought, tried, and decided under the *Gingles* framework as a vote dilution challenge to an at-large multimember electoral system. *Gingles* commands the conclusion that such challenges cannot be established under the effects test of amended section 2 when the official elected under the system is a solo governmental decisionmaker. Trial judges are solo decisionmakers, even when the electorate chooses more than one to serve the same geographical unit. Thus, regardless of whether other section 2 claims may be established against Texas's system for electing its district judges, a section 2 *vote dilution* claim may not.

The Solo Decisionmaker Argument Does Not Create An Exemption From Section 2

The petitioners mischaracterize the solo decisionmaker argument made by Texas and adopted in the five-member concurrence by Judge Higginbotham. It is not an effort to carve an exception for state district judges from amended section 2.[32] It is at least conceivable that section 2 claims other than those arguing vote dilution might be established against the judicial electoral system. *But see* Part I, *supra*.

Instead of an effort to obtain a statutory exception, the solo decisionmaker argument is a demonstration that the concept of vote dilution governed by the *Gingles*

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[32] HLA mistakenly says it is. HLA Br. 34.

standard is not so protean that it applies to every system for electing public officials. *Gingles* recognizes the limits of its own applicability, observing that amended section 2 prohibits forms of voting discrimination other than just vote dilution. 478 U.S. at 45 n.10. It also is careful to explain that its standards are not necessarily applicable beyond the confines of vote dilution challenges to at-large multimember electoral systems. *Id.*, at 46 n.12.

Discerning the difference between the inapplicability of the vote dilution concept in this setting (Texas's argument) and the effort to carve out a wholesale exemption from amended section 2 for solo decisionmakers (the mischaracterization of Texas's argument) is crucial to this part of the case. It is a prerequisite to understanding why the countywide election of state district judges cannot violate vote dilution principles embedded in amended section 2.

District Judges Are Solo Decisionmakers

The first step in the solo decisionmaker analysis is obvious. Are the officials elected under the challenged electoral system solo decisionmakers? The answer here is easy. The district court determined that the officials targeted in this case are. The Chief Justice of the Supreme Court of Texas, himself a former Texas district judge in Harris County, testified to the solo decisionmaking nature of the office of trial judge and explained that Texas district judges engage in collegial decisionmaking only for administrative functions incidental to the performance of their judicial functions. Tr. 5-81.[33]

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33 The district judges in some counties use Tex. R. Civ. P. 330 to implement a shared, or common, docket. This hardly converts the trial judges into collegial decisionmakers. In any given case, only one judge at a time decides any given issue.

In another context, the Court confirms the view of the solo nature of trial judge decisionmaking that the record in this case reflects. In *Salve Regina College v. Russell*, __ U.S. __ (March 20, 1991) (No. 89-1629), the Court contrasted the "functional components of decisionmaking" of district courts and appellate courts: "[d]istrict judges presid[ing] alone" compared to the "collaborative juridical process" and the "collective judgment" of multi-judge appellate panels.

The Connection of the Vote Dilution Concept to the Function of the Elected Office

There really being no question but that state district judges are solo decisionmakers, the other question in this analysis must be answered. What difference does it make that a vote dilution challenge is lodged against an at-large system for electing solo decisionmakers instead of one electing collegial decisionmakers? The difference lies in the origins of the concept of vote dilution and the first threshold requirement in *Gingles* for establishing an at-large vote dilution case -- whether the minority group is sufficiently large and geographically compact to constitute a majority in a single member district, 478 U.S. at 50.

The modern concept of vote dilution originated with the landmark case of *Reynolds v. Sims*, 377 U.S. 533 (1964) ("*Reynolds*"), in which the Supreme Court sustained a constitutional attack on the apportionment of the Alabama legislature. In adopting the 1982 amendments to section 2, Congress traced the lineage of racial vote dilution claims directly to *Reynolds*. *See* S. Rep. No. 97-417, p.196 (1982).[34] The interrelationship

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34 "The principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*."

of the concept of vote dilution and collective decisionmaking lies at the core of the opinion's rationale:

> [I]t would seem reasonable that a majority of the people . . . could elect a majority of . . . legislators. . . . Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are *collectively responsible* to the popular will.

377 U.S. at 565 (emphasis added). Sympathetic commentators have used *Reynolds* as a reference point to argue that courts assessing vote dilution claims should look beyond the casting of ballots to the decisionmaking function of those elected by the voters. *See* Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L.REV. 173, 180 (1989) ("*Maps and Misreadings*").[35]

Texas urges a similar focus. Courts reviewing vote dilution challenges must consider the decisionmaking function of the official whose election is targeted. Another way of stating the point is that vote dilution analysis must take into account the relationship between the voters and the purpose for which they are electing their representatives. When those representatives engage in solo decisionmaking instead of collegial decisionmaking, the concept of vote dilution is inapplicable.

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35 The same commentator continues the same tack in a more recent article, Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L.REV. 1 (1991). She argues that a court faced with a section 2 challenge must consider whether the targeted position is one whose power is exercised by a single official and whether it is "functionally necessary" that the single official exercise it. *Id.*, at 21.

Role of the First *Gingles* Factor in the Liability Phase

Turning to *Gingles'* role in this analysis, it is clear that the paradigmatic remedy under its first threshold factor is single-member districts. *See, e.g.*, 478 U.S. at 50 n.17 (explaining the theoretical basis for the first factor). Moreover, because the first *Gingles* factor is a threshold factor at the *liability phase* of a vote dilution case under amended section 2, it does not matter whether the remedy phase (if it is reached at all) culminates in an agreed remedy that uses alternative voting mechanisms to solve the problem or a court-ordered remedy that uses different single-member districts than the ones used to satisfy the first liability factor.

Making single-member districts the paradigmatic remedy at the liability phase and satisfaction of the first factor a prerequisite to proceeding further in the analysis means that remedy in vote dilution cases moves from the end of the line to the front of the line. The lower courts have recognized this consequence of the *Gingles* gloss on amended section 2. *See, e.g., McGhee, supra*, 860 F.2d at 120 (in vote dilution cases, "right and remedy are inextricably bound together"). The Seventh Circuit explains the rationale for this aspect of the *Gingles* approach:

> The Court's approach, by focusing up front on whether there is an effective remedy for the claimed injury, . . . reins in the almost unbridled discretion that section 2 gives the courts[.]"

McNeil v. Springfield Park District, 851 F.2d 937, 942 (7th Cir. 1988).

Transporting the paradigmatic remedy of single member districts to the beginning of the liability phase of a vote dilution case is of fundamental significance to the

solo decisionmaker argument. To understand why, it is necessary to explain why the state retains the authority to make the initial policy choice about the basic unit that is to form the community to be governed by its elected officials.

Integrity of States' Basic Political Arrangements

The Act itself recognizes that states retain the authority to establish the basic electoral framework and the types and configurations of the communities whose voices are to be heard in the process of representative democracy. The prohibitions of section 2 reach states and their "political subdivision[s]," and the Act specifies a definition of "political subdivision," 42 USC § 1973l(c)(2). *Gingles* emphasizes that vote dilution inquiries are "district specific," 478 U.S. at 59 n.28, and Judge Higginbotham's concurrence reasons that:

> It is implicit in Gingles that the effect of election practices must be considered after taking the underlying definition of the offices of state government as given. . . . Section 2 does not grant federal courts the authority to disregard the states' basic arrangements.

Pet. App. 103a-104a.

The recognition in the Act and *Gingles* of the states' essential authority to configure their political subdivisions into communities of representative government is consistent with the fountainhead case, *Reynolds*, which stated:

> Political subdivisions of States -- counties, cities, or whatever -- . . . have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, . . . these governmental units are "created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them," and the "number, nature, and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercise rests in the absolute discretion of the state."

377 U.S. at 575.

How Single Member Districts Fragment the Community Represented by Solo Decisionmakers

For over a century, Texas has chosen the county as the basic unit for electing district judges. It has used the same county unit to elect its county commissioners, who function through the commissioners court (a non-judicial body) as a collective decisionmaking body. Electing county commissioners from single-member districts does not destroy the integrity of the unit because the community living within the unit remains intact, so to speak, with each decision by the commissioners court. Electing state district judges from single member districts would destroy the integrity of the unit because each independently-made decision by the trial judge would exclude from ultimate participation all the voters in the districts not represented by the judge.[36]

More broadly speaking, this is to say that single member districts do not alter the basic nature of collective decisionmaking bodies. At the end of the decisionmaking process, every voter of the community will have participated through his or her representative. In this way in a representative democracy, each voter's

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36 Judge Higginbotham's concurrence outlines an example of the exclusionary consequences of such an arrangement. Pet. App. 106a-107a.

vote counts each time a decision is made. Minority voters who otherwise might be effectively excluded from the entire process because of the submergence of their vote by a bloc of Anglo majority voters have their voice heard in each decision.

The same is not true with regard to elected solo decisionmakers, even if more than one of them is elected from the same geographic area. The imposition of a single member districting scheme on an electoral system in which more than one solo decisionmaker is elected from the same political unit to perform the same type of function results in a balkanization of the political unit. The decisionmaking becomes fragmented along the same lines as the districts into which the unit is carved. It is no longer the community's collective decisionmaking. At the end of the decisionmaking process, only a portion of the voters in the community will have participated through their elected representative. This result is antithetical to the initial choice made by the state, which under the Act and the *Reynolds* rationale is sacrosanct.

Thus, if it is apparent at the liability phase of a vote dilution case that imposition of the paradigmatic single member remedy will alter the basic nature of the elected office, then no vote dilution claim can be made out. This is Texas's solo decisionmaker argument.

Irrelevancy of Alternative Remedies

The argument is not blunted by assertions that other remedies, such as limited voting mechanisms, are available which might not splinter the basic unit of representation and governance. Only by retreating from *Gingles* can the Court assign this question to the remedy phase of the case, instead of requiring its confrontation in the liability phase. Adopting HLA's argument on this point would be inconsistent with the first *Gingles*

factor.[37] The Court should adhere to *Gingles* and hold that a section 2 vote dilution claim is conceptually inapplicable to an at-large system for electing solo decisionmakers.

CONCLUSION

The legitimacy of the petitioners' ultimate objectives in this case are not called into question if the Court effectively returns the issue to Congress for it to give, for the first time, serious attention to the serious issues presented when federal courts are asked to restructure something so fundamental as a state's judicial system. Congress may deploy its enforcement powers under the Civil War Amendments only after it has deliberated over a matter. There has been no congressional deliberation.

Texas urges the Court to affirm the judgment of the Fifth Circuit for the reasons set forth in this brief. Should the Court reverse the judgment, it should remand the case to the Fifth Circuit for further proceedings consistent with the Court's decision.

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37 Some scholarly criticism has been leveled at *Gingles'* imposition of the geographic compactness requirement as a threshold vote dilution issue. Significantly for the solo decisionmaker issue involved in this case, a central element of the criticism is its emphasis on the importance of minority representation in collegial decisionmaking bodies. *Maps and Misreadings, supra*, for example, stresses what it terms the "qualitative" aspect of vote dilution which should take into account the beneficial concept of "civic inclusion." Interestingly, its depiction of the values of civic inclusion make sense only in collegial decisionmaking settings. *See, e.g., Maps and Misreadings*, at 216-17 (discussing the importance of ongoing relationships among members of a representative body and of legislative coalition building).

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HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
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v.

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Senate Report No. 97-417, 97th Cong., 2nd Sess. (1982) . . . . . *passim*

No. 90-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Introduction and Summary of Argument

The argument raised in the United States' brief advances a standard for assessing vote dilution claims under §2 that was expressly rejected by Congress. The rights of minority voters cannot be subordinated to the state's interest in

continuing to use electoral schemes that exclude minority voters from meaningful participation in the electoral process.

For the following three reasons, none of the Respondents' arguments advance supportable grounds upon which this Court can deny relief to the Petitioners. First, the so-called "single-person office" principle is inapplicable to the judicial offices challenged in this case. Second, the first prong of the tripartite vote dilution test set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986), does not preclude the application of §2 to the election of judges. Third, Congress exercised its enforcement powers under the 14th and 15th Amendments to cover state judicial elections under §2.

I. The State's Nonracial Reasons for the Use of At-Large Elections Cannot Outweigh a Clear Showing of Racial Vote Dilution.

A. A Vote Dilution Analysis that Requires Courts to Defer to the State's Interest in Maintaining At-Large Judicial Election Schemes Reintroduces the Intent Test Expressly Rejected by Congress in Amending §2

Although the United States agrees with the Petitioners that §2 covers the election of trial judges, it presents a new standard for assessing vote dilution claims involving the election of judges under the Act. The United States argues that a state's "strong, nondiscriminatory reasons for at-large judicial elections . . . can spell the difference between a lawful and unlawful electoral scheme."[1] U.S. *HLA* Brief at 17. In essence, the United States argues that legitimate state reasons for using a challenged election scheme may

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[1]Although the only question with regard to the state's interests properly before this Court is that raised by Judge Higginbotham and the Respondents -- namely, whether the state's interests may pretermit the application of §2 to the election of judges -- the United States' argument is sufficiently troubling to merit discussion here. Judge Higginbotham's argument was discussed in our opening brief. *See* HLA Petitioners' Brief at 24-49.

constitute an affirmative defense to proof of racial vote dilution.

This analysis radically departs from established standards for determining vote dilution under §2. No court ever has afforded controlling weight to the state's interests in a vote dilution case. Indeed, to afford such weight to the state's interests defeats the very design of §2's results test as contemplated by Congress and as interpreted by this Court, and re-imports into the vote dilution analysis the intent inquiry expressly rejected by Congress in amending the Act in 1982.

The United States argues that a state's interest in maintaining a challenged election scheme is entitled to "deference" except when "the plaintiffs can prove that the adoption or maintenance of an at-large system, whenever it occurred, was motivated by racial discrimination." U.S. *HLA* Brief at 23 n.14. The practical effect of this standard is to make all vote dilution claims turn on the plaintiff's ability to prove the illegitimacy of the state's interests.

Plaintiffs will prevail only when the state's asserted interests are, in fact, a pretext for intentional discrimination. Congress expressly rejected placing this burden upon plaintiffs.

The "totality of the circumstances" test was specifically designed to avoid an analysis of the rationale behind the use of a particular electoral structure -- even if that rationale was nondiscriminatory. Thus, Congress explicitly instructed that "the specific intent of this [§2] amendment is that the plaintiffs may choose to establish discriminatory results without proving *any* kind of discriminatory purpose." Senate Report No. 97-417, 97th Cong., 2nd Sess. (1982) at 28 (emphasis added)(hereinafter "S.Rep. at __").

Nor did Congress give states the right to assert nondiscriminatory purposes as an affirmative defense to a vote dilution claim. In fact, Congress specifically refused to endorse the test advanced by the United States, which would permit states to assert the legitimacy of their electoral schemes to rebut the plaintiff's proof of vote dilution. *See*

Additional Views of Senator Robert Dole,[2] S. Rep. at 195 (rejecting suggestion that "defendants be permitted to rebut a showing of discriminatory results by a showing of some *nondiscriminatory* purpose behind the challenged voting practice or structure")(emphasis added). Instead, Congress decided that whether a challenged electoral practice was adopted or maintained for legitimate reasons is of little or no probative value to a §2 results inquiry. S. Rep. at 27 (courts need make no determination "about the motivations which lay behind" the adoption or maintenance of a proposed electoral practice).

The United States, however, now advocates a radical departure from Congress' directive. It contends that "to the extent that there are legitimate and strong state interests in the at-large election of trial or appellate judges, that is

[2]Senator Dole is recognized as the architect of §2(b) of the amended Act. *See* Boyd & Markman, "The 1982 Amendments to the Voting Rights Act: A Legislative History," 40 Wash. and Lee L.Rev. 1347, 1414-1415 (1983).

powerful evidence that minority electoral failure[3] is not the product of a 'built-in bias' against minorities but stems, instead, from other, neutral factors." U.S. HLA Brief at 23.

The United States' statement regarding "built-in bias" can be interpreted several ways, all of which are erroneous. To the extent that the United States uses "built-in bias" to re-import a motivational analysis into a §2 inquiry, the statement is at odds with the amended statute. Under amended §2's *results* test, it is immaterial whether plaintiffs can prove that there is "built-in bias" in the challenged electoral scheme. Thus, even if a state adduces evidence that its policy is "well-established historically, ha[s] legitimate functional purposes and was in its origins completely without racial implications," this evidence does not change a plaintiff's showing of vote dilution. *Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984), *aff'd*, 478

[3]Petitioners have proved more than just minority electoral failure. Based on the "totality of the circumstances" Petitioners proved, and the district court found, that African American voters in Harris County "do not have an equal opportunity to participate in the electoral process and elect candidates of their choice" in district judge elections. Pet. App. at 290a-291a.

U.S. 30 (1986). Quite to the contrary, persistent minority electoral failure as a result of a confluence of "neutral factors" is the *very essence* of a §2 claim.

If the United States' reference to "built-in bias" reflects its view that a state's strong, legitimate interest in a particular electoral practice may cleanse a finding of discrimination, the statement is plainly wrong. The strength of the state's interest in a particular election scheme tells the court nothing about whether the system effectively precludes minorities from meaningful electoral participation.

No language in the statute supports the view that a state's bona fide reasons for using a particular election structure cleanses that system of discriminatory results. Section 2(b)'s terms are specific. They delineate a clear standard for claims brought under the results test. That standard is further clarified by the Senate Report, in which Congress identifies the factors most relevant to a dilution inquiry. S. Rep. at 28-29. The test, as set out in the Senate Report, "provide[s] ample guidance to federal courts"

reviewing §2 claims. S. Rep. at 16. The United States may not ignore this guidance and engraft onto the "results" test its own, contrary standard for assessing claims under §2.

There is no case law supporting the United States' argument. No court ever has refused to find liability because the strength or legitimacy of the state's interests outweighed the plaintiff's claims. In fact, in the cases relied on by Congress in developing the results test, lower courts expressly refused to immunize dilutive election schemes from challenge simply because they "satisfy some legitimate governmental goals." *Robinson v. Commisioners Court, Anderson County*, 505 F.2d 674, 680 (5th. Cir. 1974). In the relevant case law, the fundamental meaning of "built-in bias" is that despite legitimate state interests, the system *operates* to discriminate against minorities. *See e.g., Kendrick v. Walder*, 527 F.2d. 44, 49 (7th Cir. 1975).

Most disturbing, however, is the United States' contention that a state's reasons for using a challenged electoral structure can *justify* or *excuse* that system's racially

discriminatory effect. *See* U.S. HLA Brief at 17 (referring to legitimate "justification" for electing judges under present system); U.S. HLA Brief at 28 (arguing that although some state interests may be "insufficient to justify a racially dilutive electoral process," other interests might meet that standard). The United States' admission that, in its view, racially dilutive electoral processes may be permissible if they serve strong state interests is critically revealing. It demonstrates the United States' willingness to subordinate the rights of the intended beneficiaries of the Voting Rights Act, *even when dilution is proven*, to the interests of the state.

In several of the 23 racial dilution cases that the United States mentions as having been relied on by Congress in amending §2, jurisdictions offered their legitimate, nonracial reasons for adopting and maintaining an at-large election structure. U.S. HLA Brief at 21-22. Nothwithstanding the legitimate reasons offered for the use of at-large elections in those cases, Congress decided that "even a consistently

applied practice premised on *a racially neutral policy* would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S.Rep. at 29 n.117. Instead, Congress instructed that "an aggregate of factors should be considered" in assessing vote dilution claims.[4] House Report No. 97-227, 97th Cong., 1st Sess. (1982) at 30 (hereinafter "House Rep. at __"). In enumerating these factors in both the Senate and House Reports, Congress never put forth the state's interest as an affirmative defense to the use of a discriminatory election scheme. *See e.g.*, House Rep. at 30; S. Rep. at 28-

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[4]This conclusion was consistent with the lower court cases reviewed by Congress. In those cases the district courts recognized that "[d]ilution, as with so many complex factual determinations turns on an aggregation of the circumstances." *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1973). *See also Nevett v. Sides*, 533 F.2d 1361 (5th Cir. 1976) (remanding for proper assessment of aggregate of factors); *Wallace v. House*, 515 F.2d 619, 623 (5th Cir. 1975) *vacated on other grounds*, 425 U.S. 947 (1976). Thus, although the state's interests were weighed, they were considered along with all of the other factors relevant to the existence of vote dilution, and were afforded no greater weight than other factors.

At the remedy stage, courts sought to accomodate the state's interests to the extent practicable in fashioning or approving a remedy to cure the proven dilution. *See e.g., Moore v. Leflore County Board of Election Com'rs*, 502 F.2d. 621 (5th Cir. 1974) (affirming the district court's rejection of a remedial plan that diluted African American voting strength *and* undermined legitimate state interests in equality of road mileage and land area); *Perry v. City of Opelousas*, 515 F.2d 639, 642 (5th Cir. 1975).

29. *See also* Brief of HLA Petitioners at 45-49.

To the contrary, when it amended §2, Congress modified the standards set out in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), for assessing vote dilution claims and explicitly eliminated, as a primary factor in a vote dilution analysis, the state's nondiscriminatory reasons for using a challenged electoral scheme. Congress decided instead that the state's rationale is relevant only as an optional factor in the *plaintiffs'* proof of discrimination.[5] *Compare Zimmer*, 485 F.2d at 1305, and S. Rep. at 28-29. Congress identified 7 other factors that were more probative

[5]Congress identified the tenuousness of the state's policy underlying the use of the challenged electoral practice as an "additional factor that in some cases has had probative value *as part of the plaintiffs' evidence*" to establish vote dilution. S. Rep. at 29.

Under Congress' *results* test, the state's interests are irrelevant to proving the existence of vote dilution unless the plaintiffs attempt to prove "tenuousness" as part of their case in chief. When plaintiffs, as in this case, invite the inquiry, then tenousness is merely one factual question as part of the totality of the circumstances that may be found in favor of the plaintiffs or the defendants. The finding that a state electoral policy is not tenuous, however, is not an affirmative defense to proven vote dilution based on an aggregate of the other, more probative, factors identified by Congress.

Congress similarly decided that the "unresponsiveness" of elected officials is not a primary factor which need be proven by plaintiffs in a vote dilution case. *Compare Zimmer*, 485 F.2d at 1305 (listing unresponsiveness of elected officials prominently among factors to be considered) *and* S. Rep. at 29, *supra*.

of a §2 claim than articulated state interests. The United States simply ignores Congress' instructions and develops its own test for determining vote dilution under §2.

B. The State's Interest in Electing Judicial Candidates At-Large is Entitled to No Greater Deference than Its Interest in Electing Non-Judicial Candidates At-Large

The United States argues that because the "role of judges differs from those [sic] of legislative or executive officials" in that "judges are expected to be fair and impartial," the State's interest in using at-large elections may be "compelling," so as to defeat a claim of vote dilution. U.S. *HLA* Brief at 22 and 24. This argument is premised on the wholly insupportable and insulting premise that the election by minority voters of judicial candidates of their choice will destroy the impartiality judiciary.

According to the United States, an election scheme in which a white majority controls the election of judges is "accountable", while a system in which an African American

majority elects some judges is "partial."[6] Therefore, although the United States characterizes the current electoral system in Harris County, which prevents minority voters from meaningfully participating in the election of the county's 59 district judges, as one in which "all the people who may generally appear before a particular judge have a voice in the election" of that fair and impartial judge,[7] U.S.

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[6]Defendant-intervenor Wood is perhaps most candid and unabashed in articulating the concern that underlies the Respondents', Judge Higginbotham's and the United States' argument. In a revealing mischaracterization of the the petitioners' claims, Judge Wood asserts that the petitioners in Harris County seek to elect "black judges . . . accountable to black voters while other judges would be accountable to non-black voters." Brief of Respondent-Intervenor Sharolyn Wood at 43 (hereinafter "Wood Brief at __"). Judge Wood even declares that the African American voters in Harris County advocate "*a separate but equal* black judiciary serving the black community." *Id.* (emphasis added). What petitioners in fact seek as *voters*, not litigants, is participation in the selection of a county judiciary electorally accountable to all members of the electorate.

[7]The United States' position is ironic in that it, like that of the Respondents and Judge Higginbotham, fails to express similar concern, that minority voters and litigants under the present, purportedly "fair", system have virtually *no* opportunity to appear before judicial candidates of their choice. Judge Higginbotham, who attempts to calculate the likelihood of African American litigants in Harris County appearing before a judge elected from a "minority-dominated" subdistrict under a hypothetical 59 electoral sub-district plan, Pet. App. at 107a, never attempts to calculate the likelihood of African American litigants appearing before African American judges for whom they voted under the current system.

Of course, pointing out this irony does not address the legal flaw in the United States' argument: the right at stake is not the right of people who appear before a judge, but the right of African American voters to equal opportunity with white voters to participate in the election of any government official.

HLA Brief at 23, it predicts that an alternative electoral system in which minority voters have a meaningful opportunity to participate in the election of some of the county's judges will result in a "partial" judiciary controlled by a "relatively discrete segment of the jurisdiction."[8] *Id.*

These erroneous assumptions taint the United States', the defendants' and Judge Higginbotham's analysis, and lead them all to the same conclusion -- that the election of judges must be protected from vote dilution claims by minority voters. The irrational assumption that African American judges would not uphold the judicial oath of impartiality because they were elected by voters of their same race, however, does not warrant the creation of special rules and exceptions for determining claims involving judicial elections

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[8]Under the United States' definition, African American voters are a "special interest group," U.S. HLA Brief at 25, while white voters are the neutral public.

under the Voting Rights Act.[9]

Moreover, the reasons offered by Texas for electing judges countywide are not unique to the election of judges. The state's rationale is, as the United States' concedes, "the reason usually given in support of at-large elections for municipal offices [namely] that at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties."[10] U.S. *HLA* Brief at 22, quoting *Wallace v. House*,

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[9]Respondents make this argument even though alternative remedies, alleged by the HLA Petitioners in their complaint in intervention, could alleviate the unlawful dilution proved without the use of sub-districts. *See* HLA Petitioners' Brief at 57-60.

Although HLA Petitioners take issue with the State Respondents' contention that even the use of limited or cumulative voting would require sub-districting in Harris County, Brief of Respondents at 29, that argument would be most appropriately addressed at the remedial stage of this litigation.

[10]There is no evidence in the record indicating that Texas adopted or maintained the current method of electing judges to serve the state's interest in a "fair and impartial judiciary." To the contrary, all of the evidence in the record points to the conclusion that Texas chose to elect its judges in the same manner that it elects candidates for other elected offices simply because that was its custom and not to serve any particular or "compelling" interest related to the function of judges.

Indeed, the testimony of Respondent-Intervenor Judge Harold Entz, undermines the notion that at-large elections are necessary to preserve impartiality of judges. TR. at 4-90 (testifying that he knows of no instances in which the impartiality of Texas' Justices of the Peace, who are elected from sub-districts, has been questioned).

515 F.2d 619, 633 (5th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976). *See also* U.S. HLA Brief at 25. These reasons are entitled to no greater weight simply because the elected office at issue is judicial. Indeed because judges are bound by an oath of impartiality no matter how they are elected, the "ward parochialism" concern is even less compelling in the context of judicial elections than it is in the context of legislative contests.

The United States' position is particularly insupportable because the HLA Petitioners did not allege a violation based on at-large elections only. Petitioners specifically challenged the *exclusionary* features of the at-large election scheme. JA. at 16a ("[d]istrict judges in Texas are elected in an exclusionary at-large, numbered place system"). The exclusionary features of the current election scheme, including the numbered post and staggered election requirements, permit the same racially homogeneous 51% of the electorate to choose 100% of the county's judges year

after year.[11] Because voting is highly racially polarized in Harris County, the 18% African American electoral minority can rarely, if ever, elect candidates of its choice, under this system.

The State in this case has not raised any legitimate interest in maintaining the exclusionary features of its at-large election system, nor has the State explained how these features are related to maintaining a "fair and impartial" judiciary. Neither the State nor Judge Higginbotham has explained why HLA Petitioners' proposed alternative at-large election systems, which would lower the threshold of exlusion for minority voters, would not accomodate the State's purported interest in maintaining the countywide electoral feature. Indeed, the State Respondents concede that the HLA, in proposing cumulative and limited voting as alternative electoral systems, have suggested a "creative

[11]The Respondents' contention that petitioners have advanced a *per se* challenge to the at-large system is completely undercut by the fact that the HLA Petitioners alleged that a non-exclusionary at-large system could cure the dilutive nature of the current system. J.A. at 20a.

[and] useful" solution to curing the proven dilution.[12] Brief of State Respondents at 29.

C. *The State's Nondiscriminatory Reasons for Electing Judicial Candidates At-Large Cannot Cleanse the Proven Vote Dilution in this Case*

To follow the argument advanced by the United States, courts would have to ignore the fact that African American voters cannot effectively participate in district judge elections, simply because the current electoral scheme purports to serve the state's interest.[13] Congress' decision to

[12]The appropriateness of a remedy is case-specific. Therefore, contrary to the State Respondents' contention, the fact that a lower court refused to uphold the use of limited voting in a particular case is irrelevant to the propriety of that remedy in the case at hand. Brief of State Respondents at 29, *citing McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988). In *McGhee*, in fact, the plaintiffs limited their challenge to the "at-large" feature of elections for the County Board of Commissioners. 860 F.2d at 113. Here, HLA petitioners specifically challenged the *exclusionary* features of the at-large system and alleged that alternative at-large remedies could cure the proven violation in Harris County.

[13]Although Texas has expressed an interest in a fair and impartial judiciary, the integrity of a state's judiciary is undermined when one racial group in the community cannot participate in its selection. *See*, Brief of *Chisom* Petitioners at 61. It would seem logical to assume that Texas' purported interest in a fair and impartial judiciary would be served by the inclusion of minority voters in the electoral process.

end voting discrimination "comprehensively and finally," in amending the Act will not tolerate such judicial indifference to minority political and electoral exclusion. S. Rep. at 5.

Moreover, in this case the State's articulated reasons for maintaining countywide judicial elections do not negate the overwhelming evidence that racial vote dilution exists in district judge elections in Texas.

The facts in Harris County, as found by the district court, point indisputably to the existence of vote dilution. In 17 contested district judge general elections in Harris County from 1980-1988, only 2 African Americans won.[14] Pet.

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[14]Respondent-intervenor Wood simply ignores the findings of the district court and reasserts the facts offered by her expert. Many of these facts were rejected by the district court because they were of little probative value. For instance, Judge Wood asserts that the plaintiffs' expert "ignored the three 1978 district judge elections in which blacks ran -- and won -- contested races against a white candidate." Wood Brief at 8. In fact, all three African American candidates ran *uncontested* in the general election that year, although they had opposition in the primary.

Judge Wood correctly states, however, that "[t]wo of those black judges have run -- and won -- every four years since 1978. Only one of those four races was contested; therefore, Petitioners counted only that race." *Id.* Consistent with the racially polarized voting analyses approved by this Court and lower courts, Petitioners indeed focused only on contested races, specifically those in which African American candidates faced white opponents. . *See e.g.*, *Gingles*, 478 U.S. at 52-61. *See also Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989). Judge Wood's conclusions, on the other hand, are based on uncontested elections, elections involving only white candidates, and elections involving Hispanic candidates, although no

App. at 279a. African American and white candidates, even within the same political party, are elected at grossly disparate rates. Thus, 52% of white Democratic judicial candidates were elected between 1980 and 1988, while only 12.5% of African American Democratic candidates were elected.[15] TR. at 3-134-135. This fact, along with the history of discrimination in the County touching upon the

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claims on behalf of Hispanic voters in Harris County were advanced by any of the plaintiffs. Therefore, Respondent-Intervenor Wood's inflated figures which purport to show the success rate for African American candidates in judicial elections in Harris County was not accepted by the district court, and instead the court found the statistical evidence presented by the HLA "legally competent and highly probative." Pet. App. at 296a-297a.

As to the one contested general election referred to by Judge Wood in which the African American candidate won against a white incumbent, the results of that election only further support the plaintiffs' claims. In 1982 Judge Thomas Routt, the African American incumbent, won the general election by a bare majority over a virtual unknown. TR. at 3-162-163; TR. at 3-329. Judge Routt won with only 51.3% of the vote, and testified that keeping voters ignorant of his ethnicity assisted his slim victory. TR. at 3-206-207.

The facts found by the district court are subject to the clearly erroneous standard of Rule 52. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Furthermore, in §2 cases this Court has directed reviewing courts to defer to the local district judges's "particular familiarity with the indigenous political reality" of the State. *Gingles*, 478 U.S. at 79. Should this case be remanded to the Court of Appeals for review of the merits, the panel would be bound by these standards.

[15]Respondent-intervenor Wood dismisses this 40% disparity in candidate success rates between African Americans and whites within the Democratic Party as a natural result of "the vagaries of politics." Wood Brief at 44.

right of African Americans to vote, the depressed socioeconomic condition of the county's African American population, the inability of African American incumbent district judges to be elected, and the existence of extreme racial polarization in voting, support a finding of vote dilution.

D. The District Court Properly Weighed the State's Interests in this Case

The United States erroneously states that the district court "did not consider whether the State has a strong" interest in using at-large elections for judges. U.S. HLA Brief at 24. Contrary to the United States' contention, the State's interests were presented to, and carefully assessed by, the district court. Indeed 3 1/2 pages of the district court's decision are devoted to a factual analysis of the interests asserted by the State, each discussed in turn. Pet. App. at

281a - 284a.[16] The court ultimately found that these interests were "not compelling." *Id.* at 283a. In particular, the district court found that the State's interests could be accomodated using one of several possible remedies.[17] *Id.* at 284a.

E. A §2 Remedy is Directed at Curing Dilution in the Electoral Process, Not Altering the Functions Performed by Judges

Texas' repeated assertion that applying §2 to elected judges will result in federal courts taking over from the

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[16]The district court described the state's asserted interests as: "(1) judges elected from smaller districts would be more susceptible to undue influence by organized crime; (2) changes in the current system would result in costly administrative changes for District Clerk's offices; and (3) the system of specialized courts in some counties would disenfranchise all voters' right to elect judges with jurisdiction over some matters." Pet. App. at 281a - 282a.

[17]Contrary to Respondents' assertions, weighing the state's interests at the remedy phase does not "retreat" from *Gingles*. Brief of State Respondents at 44. The first prong of *Gingles*, in which minority voters show that they are sufficiently numerous and geographically compact to constitute a majority in a single-member district, does not ask plaintiffs to propose a remedy before they prove liability. The first prong of *Gingles*, as discussed *infra* at pp. 31-33, is a demonstration of the causal relationship between the challenged electoral structure and the dilution of minority voting strength.

states the function and administration of the judiciary, fatally mistates the proper scope of the remedy inquiry and the role of the state's interests in the remedial phase of the litigation. *See* Brief of State Defendants at 19-22.

First, §2 protects the rights of *voters*, not litigants. As a result, a §2 remedy is directed at changing the *electoral* process.[18] It does not, as the State Respondents suggest, "intrude into state judicial functions" or purport to change the way judges decide cases. *Id.* at 19-22.

Second, the State underestimates its own role under §2 in remedying the proven vote dilution. At the remedy phase the State, not the federal court, is accorded the first opportunity to propose an election system that affords minorities an equal opportunity to participate in the election of judges. *See McDaniel v. Sanchez*, 452 U.S. 130, 150

[18]For this reason, the Respondents' argument -- that the relevant standard for measuring minority electoral success in judicial contests is the pool of eligible minority lawyers -- fails. See State Respondents' Brief at 28; Woods Brief at 44-45. The Voting Rights Act does not protect the rights of minority *lawyers* to be elected as judges. It protects the rights of minority *voters* to an equal opportunity to elect the candidates of their choice.

n.30 (1981). So long as the dilution is completely remedied, the State may use its discretion in fashioning a plan to accomodate its *bona fide* interests. Indeed, so long as it cures the proven violation, the federal court must defer to the State's proferred plan. *White v. Weiser*, 412 U.S. 783, 797 (1973). Texas' exaggerated claims of intrusion by the federal court into the State's judicial system are not a necessary result of applying §2 to judicial elections.

In this case, in accordance with established remedial principles, the district court consistently expressed its preference for a State-created remedial plan, J.A. at 159a; Pet. App. at 303a. The court entered an interim order only after the Texas legislature failed to take action during its Special Session to create a remedial plan for district judge elections. J.A. at 159a-161a. The district court subsequently entered an order for an interim remedial plan to be used for the then upcoming 1990 elections *only*. *Id.* at 162a. The sub-district elections required in that plan mirrored the sub-district plan agreed upon by the State

defendants and the plaintiffs in an earlier settlement agreement.[19] *Id*. The proceedings in this case demonstrate that the State, therefore, has the opportunity to act as the principal architect of a remedial plan for the election of judges, should it choose to exercise its power.[20] The State is not, as the Texas Respondents suggest, a powerless entity that sits on the sidelines as the federal court restructures its judicial electoral system, unless it chooses to play such a passive role.

Nor will the application of amended §2 to the state judiciary affect the ability of the states to change to an appointive system for electing judges, as Texas asserts.

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[19]In addition, the district court's plan abolished partisan elections. Plaintiffs never challenged the partisan nature of district judge elections in the challenged counties.

[20]As discussed in our opening brief, the State is free to propose alternative remedies that remove the exclusionary features of the current electoral scheme, such as cumulative or limited voting. The existence of alternative remedies underscores the fallacy of Judge Higginbotham's and the Respondents' premature and incomplete remedy analysis.

Nor is consideration of these alternative remedies precluded because "Congress never debated" their use. Brief of State Respondents at 31. At the remedy phase of §2 litigation "courts should exercise [their] traditional equitable powers to fashion relief so that it completely remedies the prior dilution." S. Rep. at 31. Within these parameters, courts may consider any remedies proposed by the parties.

Brief of State Respondents at 30. As a matter of law, even under the Respondents' reading of the statute, plaintiffs could challenge a State's change from an elective to an appointive system under a §2 intent analysis. House Report at 18. If they were to proceed under a *results* test, however, plaintiffs would be required, as in any §2 claim, to prove that the shift from an elective to an appointive system actually violated §2 of the Act. Even in the absence of §2, however, such a change in Texas would be covered by §5, and would require preclearance from the Justice Department. This court has consistently affirmed §5's application to the election of judges. *Georgia State Board of Elections v. Brooks*, 111 S.Ct. 288 (1990); *Martin v. Haith*, 477 U.S. 901 (1986).

II. The State's Principal Argument Rests on a Fundamentally Erroneous Definition of a Single-Person Officer

In our opening brief, Petitioners demonstrated that §2 unquestionably applies to single person offices. *See* HLA Pettioners' Brief at 35-36. Further, Petitioners showed that even if the single person office analysis may be useful in examining some electoral mechanisms, it clearly is inapplicable to this case, in which 59 judges are elected from one district. *Id.*, at 36-37.

Consistent with §2's focus on the structure of the electoral system, the only court to address squarely the issue of single member offices has held that the term has a clear and unequivocal meaning that has nothing to do with the function of the challenged office. *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 518 n.19 (M.D. Ala. 1989.)[21] Furthermore, even courts faced

[21]The *Siegelman* court stated that "the *true* hallmark of a single-member office is that only one position is being filled for an entire geographic area, and the jurisdiction can therefore be divided no smaller. While mayors and sheriffs do indeed 'hold single-person offices . . . ,' they do so because there is only one such position in the entire geographic area in which they run for election. . . . What is important

with judicial electoral structures in which several judges are elected from the same district, repeatedly have held that these structures are multimember. *See Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) *aff'd* 477 U.S. 901 (1986); *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988).

The single person office principle is a descriptive, not an analytic device that has relevance, if at all,[22] when a challenged mechanism has only one office holder in the entire jurisdiction. In fact, the holding of *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), so heavily relied on by the State is limited, by its express terms, to offices in which there is one officeholder per jurisdiction.

is how many positions there are in the voting jurisdiction. It is irrelevant, in ascertaining the potential existence of vote-dilution, that these officials happen to exercise the full authority of their offices alone."

[22]*See*, Brief on Petition for Writ of Certiorari of United States as *Amicus Curiae* in *Whitfield v. Clinton*, No. 90-383 (cert. denied) (questioning the viability of *Butts* on the ground that "the [Voting Rights Act] language makes no exception for majority vote requirements, either for single member offices or other types of elected positions.") *See also*, Brief of Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* in *H.L.A. v. Attorney General of Texas*, at 26 and n.22.

Contrary to the State's assertion, nothing in *Butts* authorizes an inquiry into the challenged officeholder's decisionmaking role.[23] The fact that Texas trial judges perform certain functions alone cannot insulate these positions from §2 scrutiny. As *Amicus* the Lawyers' Committee clearly argues in its brief to this Court, Texas' application of a so-called solo decision maker theory to the challenged 59-member body is nothing more than a policy judgment that trial judges should not be elected from subdistricts. Such policy questions are never dispositive of Section 2's applicability and are clearly inappropriate at the liability phase of the proceedings.

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[23]In fact, examination of the functions of the challenged offices in *Butts* reveals that all of the positions involved collegial decisionmakers. *See, e.g., Morris v. Board of Estimate*, 489 U.S. __, 103 L. Ed. 2d. 717 (1989). Moreover, the challenged mechanism in *Butts* was a runoff primary law, not the at-large structure of the district. Thus the entire weight of the State's invented "solo decisionmaker exception" rests on Second Circuit dictum about an issue not before that court.

III. Vote Dilution Can Be Measured in the Absence of the One-Person, One-Vote Requirement

The State of Texas argues that vote dilution cannot be measured under §2 in judicial election cases because the first prong of the tripartite *Gingles* test, requiring minority voters to prove that they are sufficiently numerous and geographically compact to constitute a majority in a single-member district assumes the applicability of the one-person, one-vote rule. Brief of State Respondents at 27. In the absence of the one-person, one vote rule, the State argues, there is no articulable standard for measuring "undiluted" minority voting strength. *Id.* at 27, quoting *Gingles*, 478 U.S. at 88 (J. O'Connor, concurring).

Texas overstates the significance of the illustrative single-member district discussed in *Gingles*. In that case, plaintiffs presented illustrative maps to demonstrate that majority African American single-member districts could be created to give minority voters an opportunity to elect

candidates of their choice to the North Carolina legislature. This Court approved that demonstrative model and noted that "the single-member district is *generally* the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." *Gingles*, 478 U.S. at 50 n. 17 (emphasis added).

In Harris County, an unusually large election district in both physical size and population, plaintiffs quite easily could rely on districts used throughout the state to elect district judges as a "measure" to create illustrative districts in which minority voting strength would not be diluted. In other cases, plaintiffs may use other guides to measure minority voting strength. For example, using sub-districts to illustrate "undiluted minority voting strength," plaintiffs may draw sub-districts based on the average electoral unit used by the state to elect similar officers. For instance, in Texas, district judge districts range from populations of 20,000 to over 2 million. Many judicial districts have

populations under 50,000.[24] *See* U.S. Brief of United States at 26 n.19. Thus, petitioners in this case, demonstrated that African American voters in Harris County could constitute a majority in at least thirteen single-member districts with populations of approximately 40,000 each, a size well within the population variances tolerated by state policy.

Plaintiffs may also demonstrate, by mathematically calculating the electoral threshold of exclusion, that minority voters possess the "potential to elect" candidates of their choice under a limited or cumulative voting scheme.[25] In this case, where Petitioners challenge particular exclusionary features of the at-large system, such a demonstration would also constitute proof of the causal nexus between the current electoral scheme and the impairment of minority voters'

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[24]In fact, 29 state district judges are elected from districts of less than 30,000 persons. Brief *Amicus Curiae* of Mexican-American Legislative Caucus, *et al.*, filed in *LULAC v. Mattox*, Fifth Circuit No. 90-8014, at 12.

[25]*See e.g.*, Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.-C.L.L.Rev. 173, 223-236 (1989); R. Engstrom, D. Taebel & R. Cole, "Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico," The Journal of Law & Politics, Vo. V., No. 3 (Spring 1989). *See* discussion in HLA Petitioners' Brief at 57-60.

ability to elect candidates their of choice.

IV. Congress Has Exercised its Enforcement Power Under the 14th and 15th Amendments to Outlaw Racial Vote Dilution in All Elections

The State of Texas posits as the central question in this case, whether Congress use its enforcement authority under § 5 of the Fourteenth Amendment or § 2 of the Fifteenth Amendment to outlaw unintentional racial vote dilution in elected state judicial systems." State Respondents' Brief at 12. The answer to this basic question is, yes.

According to the State of Texas, Congress could not have exercised its enforcement powers to outlaw racial discrimination in judicial elections unless it clearly and specifically stated that it intended to do so, *id. at 12-17*, and could not have exercised that power over judicial elections in the absence of specific fact-finding regarding racial discrimination in judicial elections. *Id.* at 17-19.

This Court specifically has held that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court upheld Congress' ban on literacy tests "even though there were no findings of nationwide discrimination in voting, let alone findings that literacy tests had been used to discriminate against minorities in every jurisdiction in the country." S. Rep. at 42. Therefore, Congress may use its Fourteenth and Fifteenth Amendment powers to "enact legislation whose reach includes [jurisdictions] without a proven history of discrimination." S.Rep. at 42.

Just as Congress did not need to document the discriminatory use of literacy tests in every jurisdiction in the country to justify the 1970 amendments to the Voting Rights Act, neither is Congress required to document racial discrimination in the election of judges, to make §2 applicable to the elected judiciary. Indeed, unlike the

prohibition upheld in *Oregon*, §2 is not a blanket prohibition against the use of a particular electoral scheme or practice. Minority voters must *prove* the existence of vote dilution in the particular election scheme used by a jurisdiction under §2. Under the totality of the circumstances, judicial election schemes are each reviewed on a case by case basis.

Moreover, facts related to minority state court judges were explicitly included in the data relied upon by Congress in amending §2. *See e.g.* House Report at 7-9; Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) at 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 1647; Hearings on S.53, S.1761, S.1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) at 208-09, 669, 748, 788, 789. Contrary to the State Respondents' claim that there is only a "meager collection of references" to the election of judges, Brief of State Respondents at 25, the legislative history of

the amended Act contains numerous references in the hearings[26] to discrimination in judicial elections and the importance of increased minority participation in the state elected judiciary. These references, exhaustively cited and discussed in the Amicus Brief of the Lawyers' Committee for Civil Rights Under the Law, *et al.*, at 14-19, critically undermine the Respondents' argument.

Most importantly, Congress was satisfied that the need for amended §2 had been "amply demonstrated." House Report at 31. The House and Senate Report, as well as the volumes of testimony in the legislative history attest to Congress' "deliberation" in amending §2 to serve as "the major statutory prohibition of *all* voting rights discrimination." S. Rep. at 30 (emphasis added). This statement of purpose expresses Congress clear intention to cover racial discrimination in all elections, including those for state judges.

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[26]The House and Senate hearings held in 1981 and 1982 represent Congress' fact-finding in amending the Act.

In light of Congress' repeated insistence that amended §2 of the Act, covers *all* elections, *see e.g.* language of §2(a) and §14(c)(1), it is incumbent upon the Respondents to demonstrate Congress' clear intention to *exclude* judicial elections from the Act in 1982. The only offer of proof made by the defendants and the Fifth Circuit in this regard is the use of the word "representatives" in §2(b) of the Act. For the reasons incorporated by reference in our opening brief, the use of the word "representatives" in §2(b) of the Act does not warrant the exclusion of elected judges from the scope of the amended Act. *See Chisom* Brief at 41-42.

Congress' reasons for amending the Act are clear. They are expressly set out at page 2 of the Senate Report in a section appropriately titled "Purpose." None of those reasons relate to the exclusion of elected judges from coverage under §2 of the Act. Congress' only purpose with regard to §2 was "to amend the language . . . in order to clearly establish the standards intended by Congress for proving a violation of that section." S. Rep. at 2. Even the

Fifth Circuit agrees that the Act, prior to amendment in 1982, covered judicial elections, *see* Pet. App. at 26a-28a. Congress' stated purposes in amending the Act does not mention excluding electing judges from §2, therefore, the defendants cannot justifiably argue that Congress either purposefully or inadvertently excluded judges from the scope of amended §2.

CONCLUSION

For the reasons stated above, this Court should reverse the decision below and remand the case for determination of a proper remedy.

Respectfully submitted,

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Nos. 90-813 and 90-974

In the Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASS'N, ET AL., PETITIONERS

v.

THE ATTORNEY GENERAL OF TEXAS, ET AL.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., PETITIONERS

v.

THE ATTORNEY GENERAL OF TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether the results test of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies to the election of state court judges.

2. Whether the results test of Section 2 of the Voting Rights Act of 1965 applies to the election of offices that can be held by only one person.

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INTEREST OF THE UNITED STATES

This case, like *Chisom* v. *Roemer*, No. 90-757 (consolidated with *United States* v. *Roemer*, No. 90-1032) involves the application of the vote dilution analysis of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to state judicial elections. The United States has the primary responsibility for enforcing Section 2, and the decision of the Court in this case will have an im-

portant effect on federal enforcement efforts. In addition, the Attorney General is responsible under Section 5 of the Voting Rights Act for preclearing voting changes, and under existing regulations must withhold preclearance if he concludes that such action "is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2). This decision therefore will affect the manner in which the government reviews proposed voting changes in judicial election procedures under Section 5. The United States filed an amicus curiae brief when the case was heard by the panel and the en banc court, and presented oral argument to the en banc court.

STATEMENT

A. The Structure Of The Texas Judicial System

1. *District courts.* Texas district courts are the State's trial courts of general jurisdiction. Tex. Const. Art. 5, § 8; see generally Tex. Judicial Council, *Texas Judicial System: 61st Annual Report* 10-17 (1989) [hereinafter *Judicial Report*]. The Texas legislature creates district court seats as the need arises, assigns the seats individual numbers, and defines the geographic area that they are to encompass. Tex. Gov't Code Ann. § 24.101 *et seq.* (Vernon 1988). With one exception, all of the district court seats at issue in this case encompass single counties.[1] A 1985 amendment to the Texas Constitution allowed redistricting, on the approval of the voters, of district court seats into districts consisting of portions of counties. Tex. Const. Art. 5, § 7a(i).[2]

District court judges are elected to office for four-year terms through at-large, countywide elections. Candidates

[1] The 72nd Judicial District encompasses Lubbock and Crosby counties. See Tex. Gov't Code Ann. § 24.174 (Vernon 1988).

[2] Although Art. 5, § 7a(i) permits voters to create subcounty districts, it is not clear whether a court so created could still exercise county-wide authority.

run for numbered seats in partisan contests. Tex. Const. Art. 5, § 7a(i). While party primaries require a majority of votes to be nominated, the general election requires only a plurality to win. Tex. Election Code § 172.003 (Vernon 1986). Interim district court vacancies are filled by gubernatorial appointment. Tex. Const. Art. 5, § 28. See generally 90-813 Pet. App. 190a-191a.

The jurisdiction of Texas district courts is statewide, while venue (*i.e.*, the designation of which court with competent jurisdiction should hear a case) is determined by county. See *Nipper* v. *U-Haul Co.*, 516 S.W.2d 467, 470 (Tex. Civ. App. 1974).[3] The venue rules regarding the county in which a case should be filed are defined by general laws, see Tex. Civ. Prac. & Rem. Code Ann. § 15.001 (Vernon 1986); Tex. Code Crim. Proc. Ann. Art. 13.10 *et seq.* (Vernon 1977), or by the mandatory or permissive provisions of particular statutes, see, *e.g.*, Tex. Civ. Prac. & Rem. Code Ann. §§ 15.011-15.040 (Vernon 1986); see generally 72 Tex. Jur. 3d Venue §§ 1-99 (1990).

District courts conduct proceedings at the county seat of the county in which the case is pending. Tex. Const. Art. 5, § 7. Jury selection, case assignment, and record retention are handled on a countywide basis. See, *e.g.*, 3 Tr. 267; 4 Tr. 255-256 (lawsuits in Harris County are filed at a central intake division and are randomly assigned to a district court, as are county residents reporting for jury duty), 4 Tr. 144 (Dallas County). Administrative coordination extends across counties as well. District court judges are sometimes assigned to hear cases in district courts in other counties, 5 Tr. 120, and

[3] *Nipper* held that the Travis County district court had jurisdiction over a claim arising in Bexar County, and that the parties, both of whom lived in Bexar County, had waived their venue right to have the case transferred to Bexar County. See also *Jernigan* v. *Jernigan*, 467 S.W.2d 621 (Tex. Civ. App. 1971) (drawing same distinction between jurisdiction and venue).

this practice has been upheld against the challenge that judges have jurisdiction only in their own counties. *Reed* v. *State*, 500 S.W.2d 137, 138 (Tex. Crim. App. 1973). Under Texas law, the district courts of the State are divided into nine multicounty administrative judicial regions. See Tex. Gov't Code Ann. § 74.042 (Vernon 1988). The presiding judge of each region is granted authority to promulgate regional rules of administration, advise judges on case flow management, recommend organizational changes to the Supreme Court, and oversee the assignment of judges within and between regions. *Id.* §§ 74.046-74.060.

2. *Specialized subject matter jurisdiction courts.* Although the state legislature cannot restrict the constitutional jurisdiction of district courts,[4] laws containing new district court seats often express the intent that the judges elected to these posts give preference to certain types of matters. In this manner, the legislature has instructed certain district courts to give preference to family law matters, criminal matters, civil cases, or some combination of these areas, and some others appear to possess an informally designated subject-matter specialty. *Judicial Report* 17-19. Specialty courts are generally employed in populous, metropolitan counties. *Id.* at 10-11. Since these counties have many district courts, subject-matter preferences can be allocated among district court judges so that relatively large numbers of seats are assigned to each specialty.[5]

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[4] See, *e.g.*, *Lord* v. *Clayton*, 163 Tex. 62, 67, 353 S.W.2d 718, 721-722 (1961); *Ex parte Richards*, 137 Tex. 520, 155 S.W.2d 597, 599 (1941).

[5] According to the most recent report of the Texas Judicial Council, the 59 district court seats in Harris County are assigned subject matters as follows: 31 courts have general district court jurisdiction or a civil preference; 16 courts have preference for criminal cases; and 12 courts specialize in family law. *Judicial Report* 54. The 37 seats in Dallas County are divided as follows: 13 courts have general district court jurisdiction or a civil preference; 15 courts are assigned a criminal preference; and 9 courts are designated as family courts or assigned a family law preference. *Id.* at 45. Tarrant County has 11 courts with general jurisdiction or a civil preference; 11 courts with a criminal preference or designation; and 7 courts with a family law preference. *Id.* at 76. Jefferson County has 4 courts of general district court jurisdiction; 2 courts handling criminal matters; and 2 courts handling family law. *Id.* at 58. One of Travis County's 13 district court judges is assigned a criminal preference, *id.* at 78, and one of Midland County's three courts is designated as a family court, *id.* at 66. Ector and Lubbock Counties do not use specialized courts. *Id.* at 48, 63.

3. *Other courts.* There are 14 intermediate courts of appeals providing appellate review of the judgments of the district courts. Each such appellate court has between 3 and 13 justices, all of whom are elected in partisan elections from geographic districts. *Judicial Report* 10-11. The jurisdiction of these appellate courts is "coextensive with the limits of their respective districts." Tex. Const. Art. 5, § 6. The two courts of last resort in the State, the Supreme Court and the Court of Criminal Appeals, have nine justices each, all of whom are elected in statewide at-large partisan elections. *Judicial Report* 10.

The Texas system also includes county courts, municipal courts, and justice of the peace courts. Justices of the peace are elected from "commissioner's precincts," which divide each county into between four and eight subdistricts. Tex. Const. Art. 5, § 18. In larger counties, more than one justice of the peace may be elected from each commissioner's precinct. *Ibid.* The Texas courts have held that justices of the peace have countywide territorial jurisdiction despite their election from individual precincts. See, *e.g.*, *Zulauf* v. *State*, 591 S.W.2d 869, 872 & n.5 (Tex. Crim. App. 1979); *Bradley* v. *Swearingen*, 525 S.W.2d 280, 282 (Tex. Civ. App. 1975).

B. The Proceedings In This Case

The plaintiffs, black and Hispanic voters residing in nine Texas counties,[6] filed this suit on July 11, 1988, alleging that the use of an at-large election scheme to elect state district court judges in these counties diluted the voting strength of black and Hispanic voters, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. After a bench trial, the district court found that the plaintiffs had proved violations of Section 2 in each county. See Pet. App. 183a-304a.

1. *The district court's decision.* At the outset, the district court held that Section 2 applies to the election of judges. The court rejected the State's argument that Section 2 does not apply to the election of trial judges since trial judges act individually, not collegially. Relying on the Fifth Circuit's decision in *Chisom* v. *Edwards*, 839 F.2d 1056, cert. denied, 488 U.S. 955 (1988) (*Chisom I*), the court held that Section 2 applies to all judicial elections. Pet. App. 289a & n.32.

The court then applied the vote dilution test set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), to analyze plaintiffs' claims. The court found that plaintiffs had shown, in each county, (1) the existence of a minority group (black, Hispanic, or both) of sufficient size and geographical compactness to constitute a majority in a single-member district; (2) political cohesiveness within

[6] These nine counties are: Harris County, which has a population of more than 2,400,000 and chooses 59 district court judges in at-large elections; Dallas County, which has a population of more than 1,500,000 and elects 37 judges at-large; Tarrant County, which has more than 860,000 people and elects 23 judges at-large; Bexar County, whose population of nearly 1,000,000 chooses 19 judges in at-large elections; Travis County, which elects 13 judges and has a population of nearly 420,000; Jefferson County, which has 8 judges and more than 250,000 people; Lubbock County, with 6 judges and more than 211,000 people; Ector County, with 4 judges and more than 115,000 people; and Midland County, whose 82,000 plus residents elect 3 judges at-large. 90-813 Pet. App. 200a-209a. Hereinafter we will use "Pet. App." to refer to the petition appendix in 90-813.

that minority group; and (3) racial bloc voting by the white majority that had consistently defeated the preferred candidates of the minority group. Pet. App. 289a-301a; see *id.* at 210a-273a. The court also found relevant three other factors drawn from the Senate Judiciary Committee Report accompanying the 1982 amendments to the Voting Rights Act, see S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982) [hereinafter Senate Report]: the effects of past discrimination on minorities in Texas and the historical domination of the Texas judicial system by whites; use of numbered posts and a majority vote requirement in primaries; and the large size of five counties (Harris, Dallas, Tarrant, Bexar, and Travis). Pet. App. 273a-277a. The court also noted that minorities had not enjoyed electoral success since 1980. *Id.* at 279a-281a.

The State maintained that at-large elections were necessary for several reasons: Judges elected from areas smaller than the existing county-wide districts would be susceptible to influence by organized crime and special interest or political groups; the at-large system had administrative advantages that would be lost if courts had less than county-wide jurisdiction; and modifying the present at-large system would be unduly costly. Pet. App. 281a. The State also maintained that judges should be elected from the same area in which they exercised their primary jurisdiction, and that members of the electorate would be disenfranchised in counties that used specialized courts if persons could not vote for judges who exercise each type of subject matter jurisdiction. *Id.* at 281a-282a.

The district court found none of these arguments persuasive. It concluded that jury selection and other administrative functions could still be handled centrally on a county-wide basis, Pet. App. 284a, and that no compelling state policy required specialty court designations to be retained, *id.* at 283a-285a.[7] In sum, the court

[7] The district court also rejected the State's defense that partisan politics and not race explained the results of elections in counties

found, based on the totality of the circumstances, that the plaintiffs had proved a violation of Section 2. *Id.* at 300a-301a.[8]

2. *The court of appeals' decision.* The defendants appealed, and the en banc court of appeals reversed by a divided vote. *League of United Latin American Citizens Council No. 4434* v. *Clements*, 914 F.2d 620 (5th Cir. 1990) (*LULAC*) (Pet. App. 1a-182a).[9] The court held that although Section 2 generally applies to judicial elections, the vote dilution test of Section 2(b) does not, because judges are not "representatives" under Section 2(b) or as a general matter. Pet. App. 14a-35a.

The court noted that the concept of minority vote dilution was modeled on the vote dilution standards developed in "one-person, one-vote" cases and that by 1981 numerous federal court decisions, including one by this Court—*Wells* v. *Edwards*, 409 U.S. 1095 (1973), summarily aff'g 347 F. Supp. 453 (M.D. La. 1972) (three-judge court)—had ruled that "the judicial office is not a representative one, most often in the context of deciding

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where political party primaries were not the impediment to minority electoral success. Because the court of appeals held that judges are exempt from the results test of Section 2, it did not address this issue.

[8] In January 1990, the district court entered an order postponing upcoming elections until November 1990 in order to give the Texas legislature additional time to enact its own remedy. The court of appeals thereafter stayed the district court's order, permitting the elections to go forward.

[9] A panel also initially reversed the district court's judgment. *League of United Latin American Citizens Council No. 4434* v. *Clements*, 902 F.2d 293 (5th Cir. 1990). The majority held that Section 2 of the Voting Rights Act applies to the election of judges, 902 F.2d at 295-303, but that the results test of Section 2 does not apply to Texas trial judges, since they occupy "single person" or "single member offices," *id.* at 303-308. Judge Johnson dissented. He agreed with the majority that Section 2 applies to judicial elections, but he did not believe that trial judges in Texas hold "single member offices." *Id.* at 309-321. The court then decided to rehear the case en banc. 902 F.2d 322 (1990).

whether the one-man, one-vote rubric applied to judicial elections." Pet. App. 16a; *id.* at 16a n.9 (collecting cases). Applying the canon of construction that Congress is presumed to be aware of and endorse "the uniform construction" placed on a term, *id.* at 24a, the majority determined that Congress used the term "representatives" in order to apply the new results test of Section 2 to elections for representative, political offices but not to vote dilution claims in judicial contests. *Id.* at 16a-27a. The majority found unpersuasive the fact that the definitional provision of the Act, 42 U.S.C. 1973*l*(c)(1), defined "voting" by reference to "candidates for public or party office," because the term "representatives" in Section 2 was more specific. Pet. App. 27a-29a. Because Section 5 of the Voting Rights Act does not use the word "representatives," the majority also found irrelevant the fact that Section 5 applies to judicial elections. Pet. App. 29a.

Six members of the en banc court, in three separate opinions, concluded that the dilution test of Section 2 applies to judicial elections. Judge Higginbotham, joined by three other judges, concluded that the term "representatives" encompasses elected judges. Pet. App. 51a-90a. He nevertheless concluded that the at-large election of trial judges in Texas does not violate Section 2 since each trial judge, like each governor, occupies a so-called "single member office" whose electorate cannot be further subdivided. In such instances, he said, electing all trial judges on an at-large basis does not dilute minority voting strength. *Id.* at 90a-114a. Concurring specially, Chief Judge Clark said that he agreed with Judge Higginbotham, adding that vote dilution analysis might be appropriate when a State elects its judges from single-member districts. *Id.* at 36a-46a. Judge Johnson dissented. In his view, the Section 2(b) vote dilution test applies to judicial elections, and the "single member office" exception did not apply to district court judges in Texas, because there were multiple officeholders at that level. Pet. App. 115a-182a.

SUMMARY OF ARGUMENT

A. The results test of Section 2 of the Voting Rights Act of 1965 applies to the election of state court judges. The original version of Section 2 of the Voting Rights Act covered the election of judges, and the amended version of Section 2 did nothing to change that. Congress did not amend the law to shorten its reach; instead, Congress revised Section 2 to enact the "results" test that this Court had rejected in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). Thus, amended Section 2, like its predecessor, covers every election for public office.

The Fifth Circuit erred in ruling that the term "representatives" in Section 2(b) exempts the election of judges from the results test of the statute. The legislative history of the 1982 amendments does not indicate that Congress used that term in order to limit the scope of Section 2. Congress used that term interchangeably with "candidates" and "elected officials" to refer to those elected to public or party office. The "one person, one vote" line of decisions holding that judges are not representatives is inapplicable here, since racial vote dilution differs from geographic vote dilution.

B. The "single member office" doctrine is inapplicable to this case. That doctrine recognizes that a minority cannot prove a case of vote dilution when there is only one person who can hold a unique office. District court posts in Texas, however, are not unique. Each office is identical to every other such office. It is immaterial that each judge holds an office separately designated as a specific district court, because there is no functional difference between the differently enumerated district courts.

C. The courts must consider a strong, nondiscriminatory state interest among the "totality of circumstances" under Section 2. This Court in *Whitcomb* v. *Chavis* and the Fifth Circuit in *Zimmer* v. *McKeithen* endorsed consideration of this factor. Although it does not "trump" proof of vote dilution, such an interest can spell the difference between a finding of unlawful vote dilution and

a lawful state electoral practice. In this case, the district court did not apply the correct legal standard to the facts, so the case should be remanded for further proceedings.

ARGUMENT

THE RESULTS TEST OF SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 APPLIES TO THE ELECTION OF TEXAS DISTRICT COURT JUDGES

A. The Amended Version Of Section 2 Applies To The Election of State Judges

The district court found that the Texas at-large system of electing trial judges violates Section 2 of the Voting Rights Act under the standard that this Court applied in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The Fifth Circuit concluded that the Section 2 results test does not apply to judicial elections and therefore had no occasion to address the correctness of the district court's application of *Gingles* to the facts of this case. The questions, then, are whether the results test of Section 2 applies to judicial elections and, if so, how that test applies in such a case.

In *Chisom* v. *Roemer*, No. 90-757 (consolidated with *United States* v. *Roemer*, No. 90-1032), we have taken the position that the results test of Section 2 applies to the election of state judges.[10] As we explain in our brief in that case, the original version of Section 2 of the Voting Rights Act of 1965 covered the election of judges, and the amended version of Section 2 also applies to judicial elections. Congress did not amend that statute to shorten its reach; instead, Congress revised Section 2 in order to enact the "results" test this Court rejected in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). In addition, the Fifth Circuit erred in ruling that the term "representatives" necessarily excludes elected judges. That term is best read to include all elected officeholders,

[10] We have provided a copy of our brief in Nos. 90-757 & 90-1032 to counsel in this case.

whether in the legislative, executive, or judicial branch. For these reasons, the Section 2 results test applies to the election of state judges.

B. The Election Of Texas District Judges Is Not Exempt From The Section 2 Results Test On The Ground That District Judges Occupy "Single Person Offices"

In the Fifth Circuit, respondents argued that, even if Section 2 generally applies to judicial elections, district judges in Texas should be exempt from the Section 2 results test. Each district judge acts independently of every other judge, respondents argued, unlike an appellate judge, who is but one of several members of a collegial decisionmaking body, like a state legislature or a city council. Texas district judges, according to respondents, occupy what has been termed a "single person" or "single member office," to which a vote dilution claim is inapplicable. Several members of the court of appeals found that argument persuasive and would have reversed the district court's judgment on that ground. See Pet. App. 90a-114a (Higginbotham, J., concurring in the judgment). That conclusion, we believe, is mistaken.

The "single member office" exception is less an exception to the Section 2 results test than it is a limitation on the ability of vote dilution theory to provide a useful means of analyzing and challenging the at-large election of offices that are held by only one person. Vote dilution theory has been used as a means of proving that an electoral scheme can dilute the collective voting strength of minority groups even though individual minority voters are free to cast ballots that are given the same weight as the ballots cast by the members of every other group in the community. As the Court explained in *Thornburg* v. *Gingles*, a successful challenge to an at-large system depends on proof that a politically cohesive minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. Otherwise, a minority group's electoral failure

does not necessarily signify that minority votes have been effectively cancelled out. *Gingles* also made clear that minority voters cannot claim to have been injured by a particular electoral structure, procedure, or practice (such as the use of an at-large election) unless minority voters have the potential to elect representatives in the absence of the challenged voting device. For example, if a minority group has the ability to elect legislators from single-member districts, but has been unable to do so in an at-large system, the group can challenge the State's use of an at-large system on the ground that it dilutes the votes of the minority group. A violation can be remedied by redrawing the geographic boundaries of the at-large system into single-member units. But if a minority group is dispersed throughout the districts, that group lacks the ability to elect representatives in a single-member system, and the at-large nature of the electoral system cannot be said to dilute minority votes. See *id.* at 50-51 & n.17.

The vote dilution theory recognized in *Thornburg* v. *Gingles* cannot be applied to the at-large election of an office that is occupied by only one person to represent the entire district. In that event, a minority group, by definition, is *not* "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. Under those conditions, it is not the at-large nature of a system that causes the dilution of minority votes, but the decision to elect only one person to the office involved and the impossibility of subdividing the one office into components. The vote dilution theory endorsed in *Thornburg* v. *Gingles* does not extend so far as to invalidate the use of such offices by requiring, for example, multiple governors or mayors.

The decision in *Butts* v. *City of New York*, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986), illustrates the "single person office" concept. *Butts* involved a Fourteenth Amendment and Section 2 challenge to a New York law requiring run-off primary elections

if no candidate received 40% of the vote for the positions of mayor, city council president, and comptroller, each of which were held by only one person. The court held that the challenged law did not improperly dilute the votes of minorities because dilution principles governing election to multimember bodies, such as a city council, do not apply to single-member offices, like mayor, because "[t]here can be no equal opportunity for representation within an office filled by one person." 779 F.2d at 148. When elections are held for a mulitmember body, a minority group has the opportunity to secure "a share of representation" equal to other groups of citizens by electing members from districts in which the minority is dominant. But because "there is no such thing as a 'share' of a single-member office," the Second Circuit stated, vote dilution theory cannot be applied in the case of offices that govern the entire electorate and that are held by only one person. *Ibid.* See also *United States* v. *Dallas County Comm.*, 850 F.2d 1430, 1432 n.1 (11th Cir. 1988) (relying on *Butts* v. *New York* to hold that the at-large election of a single probate judge is permissible). Cf. *City of Port Arthur* v. *United States*, 459 U.S. 159 (1982) (striking down run-off requirement for seats on multimember city council without mentioning the run-off requirement for mayor). Compare *Dillard* v. *Crenshaw County*, 831 F.2d 246, 251-252 (11th Cir. 1987) (chair of county commission was not treated as a single-member office); *Southern Christian Leadership Conference* v. *Siegelman*, 714 F. Supp. 511, 518-520 (M.D. Ala. 1989) (single-member office principle is inapplicable to elected Alabama circuit and district judges).[11]

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[11] In *Butts*, the court of appeals held that a plurality vote runoff requirement for a single-person office was not subject to Section 2. 779 F.2d at 151. In our view, the method of electing a single-member office is not immune from attack under Section 2; minority voters should be able to challenge hurdles to success other than the at-large structure of an election.

Of course, it is theoretically possible to eliminate a single member office by creating a new office that can be occupied by independent officeholders either simultaneously or on a rotating basis. See Note, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 Mich. L. Rev. 2199 (1990) (endorsing that proposal). The Voting Rights Act, however, does not reach that far. As Judge Higginbotham wrote, the Act does not require the States to restructure their elected positions, Pet. App. 90a-91a; instead, it guarantees minorities the same "opportunity" as other members of the electorate "to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Section 2 expressly disavows any requirement of proportional representation for minority groups, and Congress made clear that the Act does not prohibit all use of at-large systems. See Senate Report 2, 16, 31-33, 68. See also *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) (upholding an at-large system over a racial note dilution claim); *id.* at 156-160 (holding that multimember systems are not per se unconstitutional); *White* v. *Regester*, 412 U.S. 755, 765 (1973), and *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1304 (5th Cir. 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976) (stating that at-large systems are not per se unconstitutional), *cited at* Senate Report 33. Accordingly, the vote dilution theory of *Thornburg* v. *Gingles* does not invalidate single member offices.

The single member office principle, however, only applies to a narrow category of elected offices: ones for which the electoral district cannot be subdivided because only one official is elected from a geographic region. That principle, accordingly, does not apply in this case, given the structure of the Texas district court system. Each county elects between 3 and 59 district court judges; none elects only one. Nor does each district judge have unique responsibilities; all have the same authority and exercise the same responsibility. Some judges specialize

in criminal, civil, or family law cases, but each district court within each county is interchangeable with every other office, and courts with the same specialization are entirely fungible. Under these circumstances, the Texas electoral system in each county can be subdivided into separate units without having to perform surgery on the functions performed by the office of district court judge. The single member office barrier to the application of the Section 2 vote dilution analysis does not exist in this case.

Judge Higginbotham concluded that a function of the office of district judge is to represent the entire community, and that creating subdivisions within counties would thus alter the nature and function of that office. Pet. App. 103a-112a. But if that analysis were correct, no at-large election to a multimember body could ever be successfully challenged under Section 2, because every State could maintain that it is the function of each officeholder to represent the entire community. That proposition may be true, but it is also largely immaterial to the question of *coverage*. Rather, it is an interest to be considered under the "totality of circumstances." What is pertinent is whether the functions that an office is empowered to carry out under state law are unique, not whether an officeholder can be said to represent a particular geographic community when exercising the power of his office. The district courts in this case are not unique, and the single member office doctrine thus does not apply.

Respondents also maintained below that district judges occupy single member offices because each judge is elected from a separate numbered district. Although it is true that district judges are technically elected to different judicial districts, each district in a county is identical to every other district. The designation of a judge as sitting for a particular numbered judicial district thus does not affect the nature of the position that judge holds, and therefore is of no consequence to the Section 2 analysis. For example, by designating 59 judicial districts in Harris County, all of which cover the same geographic area, Texas has just identified different numbered posts for election purposes, thereby allowing candidates to run in head-to-head contests. That designation does not give rise to a "single person office" for purposes of Section 2 because it does not affect the nature of the office itself.

C. A State's Strong, Nondiscriminatory Reasons For At-Large Judicial Elections Are Among The "Totality Of Circumstances" That Courts Must Consider In Determining Whether There Has Been A Violation Of Section 2

Texas maintains that the at-large election of district judges helps ensure that they are responsive to the community while at the same time lessening the risk that they will be susceptible to undue influence by particular components of it. We disagree with respondents that this justification is sufficient automatically to exempt judges from Section 2, but we believe that such a justification is a legitimate one and must be considered by the courts among the "totality of circumstances" in applying Section 2. 42 U.S.C. 1973(b). In some instances, that interest can spell the difference between a lawful and unlawful electoral scheme. Since the district court did not apply the correct legal standard to the facts, the judgment should be vacated and the case remanded for further proceedings.

1. *A "strong state policy divorced from racial discrimination" supporting at-large judicial elections is a "circumstance" for the courts to consider in determining whether Section 2 has been violated*

Historically, electoral schemes were initially challenged on the ground that the malapportionment of representatives effectively diluted the votes of individual electors. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). An at-large election can remedy that problem, but also can lead to a

different one, group vote dilution. Group vote dilution occurs when the practical operation of an electoral system effectively erases or minimizes the voting strength of a particular group, such as a racial minority. *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965). To prove that an at-large electoral system dilutes minority votes, a plaintiff must "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White* v. *Regester*, 412 U.S. at 766. See also *Whitcomb* v. *Chavis*, 403 U.S. at 149-153.

In *Zimmer* v. *McKeithen*, the Fifth Circuit distilled from this Court's decisions in *Whitcomb* and *White* a list of factors for the courts to use when analyzing a racial vote dilution claim. 485 F.2d at 1305. The later significance of the Fifth Circuit's discussion merits lengthy quotation, *ibid.* (footnotes omitted):

> The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, *Whitcomb* v. *Chavis*, *supra*, would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. Conversely, where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.

The Fifth Circuit and other courts relied on what became known as the "*Zimmer* factors" in the vast majority of subsequent cases. *E.g.*, *David* v. *Garrison*, 553 F.2d 923, 927 (5th Cir. 1977). The Senate Judiciary Committee Report accompanying the Voting Rights Act Amendments of 1982 noted that fact, Senate Report 23, and endorsed that approach to the resolution of Section 2 claims, Senate Report 27-30. The Report also set out a list of "[t]ypical factors" that a plaintiff could invoke to prove racial vote dilution, *id.* at 28-29, that was "derived from the analytical framework used by th[is] Court in *White*, as articulated in *Zimmer*." *Id.* at 28 n.113. See *Thornburg* v. *Gingles*, 478 U.S. at 44-45.

One factor expressly mentioned in *Zimmer* was whether "the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination." 485 F.2d at 1305. The Fifth Circuit in *Zimmer* believed—correctly, in our view—that this Court had endorsed that factor in *Whitcomb* v. *Chavis*. 485 F.2d at 1305 (citing *Whitcomb*). The Fifth Circuit often reiterated that factor in later cases, although it did not rely on it to uphold an at-large electoral scheme.[12] Nevertheless, for several reasons, we believe

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[12] See *Turner* v. *McKeithen*, 490 F.2d 191, 194 (5th Cir. 1973) ("the strength of the state interest in multi-member or at-large voting"); *Robinson* v. *Anderson County Comm'rs Court*, 505 F.2d 674, 680 (5th Cir. 1974) (considering and rejecting justification for apportionment; "the mere fact that an apportionment plan may

that strong state policies underlying the at-large election of judges are factors that the courts must consider in determining whether such a system violates Section 2.

First, the text of Section 2 requires the courts to consider the "totality of circumstances" when analyzing a Section 2 claim. This Court has recognized that the State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry, see *Whitcomb* v. *Chavis*, 403 U.S. at 149, while the Fifth Circuit in *Zimmer* expressly approved the use of this particular factor in the balance of considerations. 485 F.2d at 1305. The Senate Report on the 1982 Amendments favorably cited *Whitcomb* and *Zimmer* when discussing how amended Section 2 would operate. See Senate Report 24-33.

Second, Section 2 applies to all state electoral mechanisms, not simply the use of at-large elections. For instance, a state law requiring a person to be a member of the state bar for a set number of years before becoming a judge could conceivably be challenged on the ground that it dilutes the pool of candidates for the bench. For that matter, a rule that the candidate with the most votes wins could conceivably be challenged on the ground that it prevents minority groups from electing a representative to a single-member office, like governor. If so, it would be odd in the extreme for Congress to have prevented the

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satisfy some legitimate governmental goals does not automatically immunize it from constitutional attack on the ground that it has offended more fundamental criteria"); *Bradas* v. *Rapides Parish Police Jury*, 508 F.2d 1109, 1112 (5th Cir. 1975) (quoting *Turner*); *David* v. *Garrison*, 553 F.2d 923, 927, 930 (5th Cir. 1977); *Parnell* v. *Rapides Parish School Bd.*, 563 F.2d 180, 184 (5th Cir. 1977); *Bolden* v. *City of Mobile*, 571 F.2d 238, 244 (5th Cir. 1978), rev'd, 466 U.S. 55 (1980). Cf. *Hendrix* v. *Joseph*, 559 F.2d 1265, 1269 (5th Cir. 1977); *McGill* v. *Gadsden County Comm'n*, 535 F.2d 277, 280-281 (5th Cir. 1976) (plaintiff did not show that state policy was tenuous or discriminatory). Compare *Moore* v. *Leflore County Bd. of Election Comm'rs*, 502 F.2d 621, 624-625 (5th Cir. 1974) (in reviewing the remedy imposed by the district court, "[e]qualization of land area and road mileage is extremely important here").

courts from considering the legitimacy and weight of the State's interest in such rules, focusing instead solely on their dilutive effect. What is more, focusing exclusively on the dilutive effects of a state electoral practice while not giving any weight to the State's interests could well lead to requiring proportional representation, which the Act expressly states is not required. Congress hardly intended that the operation of Section 2 would result in an outcome that its text expressly disavows.

At the same time, we do not mean to suggest that proof of a strong state interest automatically trumps proof of racial vote dilution. Section 2 is a broadly based prohibition on electoral practices that, intentionally or not, deny minority voters equal access to the electoral process. As a footnote in the Senate Report explains, "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors [derived from *Zimmer* v. *McKeithen*, *supra*] that the challenged practice denies minorities fair access to the process." Senate Report 29 n.117. See *Bolden* v. *City of Mobile*, 571 F.2d 238, 244 (5th Cir. 1978) ("[c]ity-wide representation is a legitimate interest, and at-large districting is ordinarily an acceptable means of preserving that interest [but] the district court was warranted in finding that the city's interests in its at-large plan did not outweigh the strong showings by the appellees under the other *Zimmer* criteria"), rev'd, 446 U.S. 55 (1980).

The often dilutive effect of at-large elections on minority voting strength was of considerable importance to Congress in 1982. Congress knew that many localities had enacted at-large systems for legitimate governmental reasons, and no one disputed that there was legitimate governmental support for at-large elections. "The reason usually given in support of at-large elections for municipal offices is that at-large representatives will be free from possible ward parochialism and will keep the in-

terests of the entire city in mind as they discharge their duties." *Wallace* v. *House*, 515 F.2d 619, 633 (5th Cir. 1975), vacated on other grounds, 425 U.S. 947 (1976). See also *McMillan* v. *Escambia County*, 638 F.2d 1239, 1244 (5th Cir. 1981) (describing "good government" basis for at-large elections). Congress explicitly relied on a list of 23 lower court decisions that applied dilution principles. Senate Report 32. In several of those cases, where defendants had alleged race-neutral grounds for at-large elections, the courts held that the elections were unlawfully dilutive and required the adoption of a single-member districting system for future elections to ensure that the State's electoral methods did not dilute minority voting.[13]

Analysis should also be informed, however, by the fact that the role of judges differs from those of legislative and executive officials. In balancing the strength of race-neutral state policies against evidence of vote dilution under the "totality of circumstances," it is obviously pertinent to consider the nature of the office at issue. The most obvious difference is that while legislators, and, perhaps, to a lesser extent, executive officials are expected to advance and protect the interests of their constituents, and are elected to do just that, judges are expected to be fair and impartial. Thus, "responsiveness" to minority voters is not a relevant concern in evaluating judicial elections.

The important state interest in ensuring a fair and impartial judiciary must also be carefully considered in evaluating a State's decision to elect judges at-large. The State may believe that judges should be discouraged from thinking of themselves as representing only a por-

[13] *Zimmer* v. *McKeithen*, 485 F.2d at 1307; *Hendrix* v. *Joseph*, 559 F.2d 1265 (5th Cir. 1977); *Kendrick* v. *Walder*, 527 F.2d 44 (7th Cir. 1975). See also *Wallace* v. *House*, 515 F.2d at 632-633; *Bolden* v. *City of Mobile*, 571 F.2d at 244.

tion of a particular jurisdiction.[14] In addition, a State may determine that small electoral districts must be avoided in order to prevent a relatively discrete segment of the jurisdiction from controlling the election of trial judges. A State may determine that fairness, impartiality, and public confidence are significantly aided where all the people who may generally appear before a particular judge have a voice in the election of that judge.[15] Finally, to the extent that there are legitimate and strong state interests in the at-large election of trial or appellate judges, that is powerful evidence that minority electoral failure is not the product of a "built-in bias" against minorities but stems, instead, from other, neutral factors. *Whitcomb* v. *Chavis*, 403 U.S. at 153. Considering the State's interests—which may be different in both nature and magnitude for the at-large election of judges than for the at-large election of legislators—is therefore consistent with the principle in the case law and legislative history that "'the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality' and on a 'functional' view of the political process." *Thornburg* v. *Gingles*, 478 U.S. at 45 (quoting Senate Report 30 & n.120). See *White* v. *Regester*, 412 U.S. at 766-767; *Whitcomb* v. *Chavis*, 403 U.S. at 149-155.

Section 2 is broad in its reach, but there is no reason to believe that, in passing the amendment in 1982, Con-

[14] Of course, where the plaintiff can prove that the adoption or maintenance of an at-large system, whenever it occurred, was motivated by racial discrimination, the State's interests are not entitled to deference.

[15] A State may conclude that its court of last resort is the authoritative source of state law, including the state constitution, and that all of the people in the State should have a vote for each member of the court entrusted with that responsibility. Once a State, as here, decides to elect judges from areas smaller than the entire State, closer scrutiny is appropriate, as the State has already determined to make the judge accountable to only part of the State's electorate.

gress sought to alter the fundamental nature of judicial offices established by the State or require a method of election that irreconcilably conflicts with those offices. After all, Section 2 is addressed to voting practices, not to the definition of state offices. Thus, if Texas consistently elects trial or appellate judges at-large in order to ensure the appearance of fairness and impartiality in the judicial process, its interest may not be just "strong" but "compelling." Such an interest should be considered along with other factors in the totality of circumstances.

2. *The district court did not consider whether the State has a strong, nondiscriminatory policy supporting the use of at-large judicial elections*

Judge Higginbotham concluded that Texas has tied together a district court's electoral and jurisdictional base as a means of protecting each judge's independence without compromising the fact and appearance of impartiality. The independent decisionmaking authority of each trial judge is "a structure we must accept," Pet. App. 104a, Judge Higginbotham concluded, and a federal court cannot create or direct the State to create single-member districts for judicial elections because doing so would interfere with the State's achievement of those critical governmental interests. *Id.* at 108a-112a. We believe that Judge Higginbotham's conclusions are at least premature, as the facts necessary to a proper assessment of the way in which Texas uses at-large elections to advance governmental interests, and the strength of those interests, have been neither fully developed nor analyzed. It is not clear that Texas has met the standard in this case of demonstrating that at-large elections of trial judges serve a strong state policy. Nor has the state policy been weighed against the evidence of vote dilution in this case. The case therefore should be remanded so the district court can carry out the appropriate analysis.

a. *A representative yet impartial judiciary.* The State's principal justification for holding at-large judicial

elections is that using subdistricts could lead to the fact and perception of judicial bias and undue influence by special interest groups. This rationale has been used to defend at-large elections for legislative and executive offices, see *City of Mobile* v. *Bolden*, 446 U.S. at 70 n.15 (plurality opinion); *Zimmer* v. *McKeithen*, 485 F.2d at 1301; cf. The Federalist No. 10, at 82-84 (J. Madison) (C. Rossiter ed. 1961),[16] but assumes heightened importance in judicial elections, for all the reasons the judiciary is different from the other branches. Several witnesses testified that at-large election of judges was necessary for this reason,[17] and this factor may be one of the "totality of circumstances" showing that minority electoral failure cannot be attributed to a state system that improperly dilutes minority votes.

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[16] See also *Dallas County* v. *Reese*, 421 U.S. 477, 479-480 (1975); *Chapman* v. *Meier*, 420 U.S. 1, 20 n.14 (1975); *Dusch* v. *Davis*, 387 U.S. 112 (1967); *Fortson* v. *Dorsey*, 379 U.S. at 438 (all concluding that multimember districts can be justified on the ground that an officeholder represents the entire geographic region, not simply one district).

[17] For example, District Judge Mark Davidson testified that holding elections for judges from districts that are smaller than the existing county-wide districts would mean that "the political pressures, at least on judges from Harris County, would increase substantially," 3 Tr. 264, and "forum shopping * * * would increase dramatically," as parties sought to "find an attorney * * * with some political pressure, for example, over the Judge of the Court whose case you fell in," 3 Tr. 265. Professor Anthony Champagne opposed creating subdistricts because "[t]heoretically the larger the population you serve the more insulated a Judge would be from special interest group pressure." 4 Tr. 146. District Judge Carolyn Wright expressed the same opinion. 4 Tr. 191. District Judge Harold Entz testified that using smaller electoral districts could give rise to a public perception that some judges would be elected, and some litigants would be successful, simply because of their race. 4 Tr. 82, 88-90. He also expressed concern that smaller judicial districts could help enable large-scale drug traffickers to influence the outcome of elections. 4 Tr. 83-84.

There is, however, evidence tending to disprove the claim that at-large county-wide elections are essential to ensure a representative and impartial bench. The Texas Constitution does not require county-wide election of the district judges; it permits the voters to select them from sub-county districts. Tex. Const. Art. 5, § 7a(i). Justices-of-the-peace are elected from precincts smaller than a county, and some election districts of a similar size could be created here.[18] There also was testimony that justices-of-the-peace, who are elected from such precincts, had no difficulties with bias or allegations of bias. 4 Tr. 90. Electoral districts that are smaller than a county can still be quite large. Harris County, for example, has a population of nearly 2.5 million and 59 district judges. Even were Harris County to be divided into 59 subdistricts (a remedy that we do not contend is required), each district would contain approximately 41,000 people.[19] Moreover, were a remedy necessary, the use of several multimember districts in large counties might be far preferable to the use of single-member districts. Finally, the potential for the fact or appearance of bias is present whenever judges are elected, while the interest in making judges accountable to minority voters can perhaps be served only by eliminating an at-large system.

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[18] County population ranges from 82,000 (Midland County) to 2.4 million (Harris County). Under the Texas Constitution, counties with a population of 30,000 have 4-8 justices-of-the-peace subdistircts, while counties with a population of 18,000 can have 2-5 such precincts. Tex. Const. Art. 5, § 18(a).

[19] Dallas County, with a population of 1.5 million people, has 37 judges. Were it divided into 37 subdistricts, each one would contain about 42,000 people. There are currently judges elected county-wide from counties with populations of similar size. By our count, 114 of Texas's 362 district courts are elected from areas of less than 100,000 people, and 61 of those are elected from areas of 50,000 or less. (County populations were determined by reference to United States Department of Commerce, 1980 Census of Population—Texas (1982).)

b. *Electoral accountability.* A related justification for holding countywide at-large elections is that it helps to ensure that judges are accountable to the persons over whom they exercise jurisdiction.[20] That rationale is a legitimate one, but its force is weakened by the fact that Texas law does not treat all judges alike.[21] Justices-of-the-peace, which are trial courts below the level of district courts, are elected from sub-county precincts even though these officers exercise jurisdiction over an entire county.[22] District courts also can exercise jurisdiction over cases arising beyond the county boundaries since the parties can agree to permit a court to adjudicate a case that does not arise within the county. Page 3 & note 3, *supra*. Furthermore, district court judges often hear cases in other counties to help manage the docket, 5 Tr. 120, and the residents of a county in which a district judge temporarily sits have no recourse against him at the polls. This disuniformity may signify that the accountability rationale is less weighty in practice than might otherwise be the case.

c. *Specialized courts.* District Judge Davidson testified that applying the results test of Section 2 could disrupt

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[20] For instance, Texas Supreme Court Chief Justice Thomas Phillips, testifying for the State, said that at-large elections assured that judges "ought to be accountable to those people who can be hailed into their Court," 5 Tr. 120, and trial judges therefore ought to be elected from the same area over which the court has judisdiction.

[21] Witnesses also testified that votes for judges were cast based on factors such as party affiliation, name recognition, or other considerations unrelated to judicial performance. 3 Tr. 270; 4 Tr. 120; 5 Tr. 129. Although that fact would tend to undercut the State's asserted interest in accountability, because the same criticism can be lodged agains *any* electoral scheme, it is not clear that this criticism has any weight here.

[22] Justices-of-the-peace can try cases that arise in other precincts. *Bradley* v. *Swearingen*, 525 S.W.2d 280, 282 (Tex. Civ. App. 1975). See also *Zulauf* v. *State*, 591 S.W.2d 869, 872 & n.5 (Tex. Crim. App. 1979).

the use of specialized courts. Because the counties that use specialized courts generally have many of each type of court, pages 4-5 note 5, *supra*, the State could retain the use of specialty courts in large counties and still remedy dilution, were any such remedy necessary, by, for example, dividing the specialty courts among districts and having each district elect each type of judge.

d. *Administrative benefits.* Several witnesses testified that county-wide elections have administrative advantages that would be lost if smaller electoral districts were used, such as county-wide records retention, random assignment of cases to judges within the county (which aids docket control), and county-wide jury selection. 3 Tr. 257, 264; 4 Tr. 257, 261. Such benefits may well be valuable, but by themselves are insufficient to justify a racially dilutive electoral process. See *Westwego Citizens for Better Gov't* v. *Westwego*, 872 F.2d 1201, 1211 (5th Cir. 1989).

e. *Other aspects of at-large judicial elections.* It may be possible to modify other aspects of the electoral apparatus in a fashion that ameliorates the dilutive effect of an at-large system. For instance, judges are elected in head-to-head contests. That factor, which the legislative history of Section 2 identified as a common method of diluting minority voting strength, Senate Report 29, could be modified without also eliminating at-large elections.

In sum, the careful assessment of the strength of the State's interests in the present method of election has not been properly performed, nor have those interests been balanced against the showing of vote dilution. The case should be remanded for that purpose.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

STATUTE INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee set forth in section 1973b (f) (2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Nos. 90-757, 90-1032, 90-813, & 90-974

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IN THE

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(Caption Continued on Inside Cover)

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE AMERICAN JEWISH CONGRESS, AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens is an important part of the Committee's work, and the Committee has represented minority citizens in challenges to discriminatory judicial elections in Mississippi, Louisiana and Florida under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. In the Louisiana case, the trial court found liability under Section 2 following a full trial on the merits (*Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988)), but was required to vacate the finding because of the Fifth Circuit's holding in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc).

The American Civil Liberties Union is a nationwide membership organization with over 250,000 members. It has a longstanding concern with promoting equality of the franchise. Since 1965, it has maintained a Southern Regional Office which represents minority voters in a number of voting rights cases, including the Voting Rights Act challenge to discriminatory judicial elections in Georgia.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure,

through litigation and education, the constitutional and civil rights of Hispanics living in the United States. MALDEF and its attorneys have engaged in substantial litigation to protect the right of Hispanics to an undiluted vote as guaranteed by the Fourteenth Amendment and Sections 2 and 5 of the Voting Rights Act.

The American Jewish Congress is a not-for-profit organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of Americans. The Congress believes that in a democracy, these rights depend upon free and fair access to the ballot and the political process. In accordance with that belief, the Congress has long advocated, both in legislatures and courts, vigorous protection of the right to vote.

The American Jewish Committee ("AJC") is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jewish Americans. It has always been the conviction of the AJC that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve those of all Americans, irrespective of race, religion, sex or national origin.

Each of the *amici* participated in the legislative process culminating in the enactment of amended Section 2 in 1982. *Amici* are, therefore, particularly competent to offer views regarding the principles and history associated with the legislation. In addressing the major points that refute the lower court's restrictive construction of Section 2, *amici* have paid special attention to arguments and information not included, or not developed as fully, in the parties' briefs.

SUMMARY OF ARGUMENT

1. Contrary to the holding of the United States Court of Appeals for the Fifth Circuit, Congress did not intend to exclude discriminatory elections for state judges from the coverage of Section 2 at the same time it amended the statute in 1982 to eliminate the requirement of proving discriminatory intent.

A. An examination of the language and structure of Section 2 demonstrates that it covers all elections. Section 2(a) uses the terms "vote" and "voting" to describe Section 2's scope, and those terms are defined in Section 14 (c)(1) of the Act, 42 U.S.C. § 1973*l*(c)(1), to include "any primary, special, or general election . . . with respect to candidates for public or party office." By contrast, Section 2(b) does not serve the function of describing the scope of elections covered, but instead sets forth how "a violation of Section 2(a) is to be established." Thus, there is no warrant for concluding that the word "representatives," which appears only at the end of a conjunctive clause in one sentence of Section 2(b), is a definitional term intended to exclude an entire category of elections from the coverage of Section 2.

B. In addition, even if Section 2(b) could be read to define the scope of elections covered, the use of the word "representatives" does not indicate an intent to exclude elected judges, but instead refers to any elected official. The use of the word in political science literature and historical writing on the constitution and judicial selection, as well as its practical usage, demonstrate that it can readily be employed without excluding elected judges.

C. The purpose of the 1982 amendment was to expand the statute's coverage by eliminating any requirement of proving discriminatory intent. It is inconceivable that Congress, at the same time, would have removed from Section 2 an entire category of elections without any mention of the exclusion in the extensive debates, congressional hearings, and committee reports that accompanied the legislation. Furthermore, testimony at the congressional hearings concerning the 1982 amendments to the Act described pre-1982 vote dilution litigation involving elected judges, discussed discriminatory practices in judicial elections, and mentioned the aspirations of minorities for greater representation on the elected state bench. This contradicts the contention that Congress, without any indication in the legislative history, excluded discriminatory elections for judges from the scope of Section 2.

2. Judge Higginbotham, along with three other judges, concluded that Section 2 covers appellate judges but not trial judges. However, Congress never suggested any intent to limit Section 2 to such selective coverage, and the language, purpose, and legislative history refute Judge Higginbotham's concurrence. The view advanced by the concurrence is that the state interests behind maintaining electoral districts geographically coextensive with trial court jurisdiction are so strong that they automatically outweigh the goals of Section 2 and are therefore invulnerable to challenge under Section 2. That is nothing more than an attack on the potential remedy of subdistricting, by which judges are elected from subdistricts within a judicial district and hear cases from throughout the district. However, even if that analysis of subdistricting were correct, a state has other options to consider when adopting remedial plans—options that would protect any state interest in keeping electoral districts geographically coextensive with the trial judges' normal jurisdiction. The appropriateness of subdistricting as a remedy is not dispositive of the *general applicability* of Section 2 to trial judges. Moreover, there is no reason to believe that the state's interests would be undermined by subdistricting. In addition, the concurring opinion misconstrues the nature of the interests protected by Section 2, and places far too much weight on the "responsiveness" of elected judges to minority litigants if subdistricting were to occur.

3. Judge Clark, in a concurring opinion for himself, contended that Section 2 does not apply to any elections for trial or appellate judges where the judges' jurisdiction is geographically coextensive with their election district. There is no reason to believe Congress intended such an exception to Section 2. As with Judge Higginbotham's concurrence, Judge Clark's view is premised on what he perceives to be the fundamental state interest in retaining judicial election districts that are coextensive with the normal jurisdiction of the judges elected. That view erroneously assumes that subdistricting is the only remedy available for state to adopt, and misperceives both the state's interests and the interests Congress sought to protect with Section 2.

ARGUMENT

I. THE LANGUAGE, STRUCTURE, PURPOSE, AND LEGISLATIVE HISTORY OF SECTION 2 SHOW THAT CONGRESS INTENDED IT TO APPLY TO ALL ELECTIONS AND DID NOT INTEND TO EXCLUDE JUDICIAL ELECTIONS.

In 1982, Congress amended Section 2 to broaden its coverage by eliminating any requirement of proving discriminatory intent. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). The Fifth Circuit held that Congress, by using the word "representatives" in the text of Section 2, intended at the same time to exclude all elections for state court judges from Section 2's coverage, even though no such exclusion is mentioned anywhere in the numerous debates and hearings and the lengthy committee reports on the amendment. The Fifth Circuit's reliance on this one word runs afoul of this Court's frequent admonition that courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (internal quotations and citations omitted). As demonstrated below, the language and structure of Section 2, the purpose of

the 1982 amendment, and the legislative history all refute the Fifth Circuit's interpretation.

A. The Language and Structure of Section 2 Compel the Conclusion That All Elections, Including Judicial Elections, Are Covered.

The language and structure of the Act establish that Section 2 is not selective with respect to the offices covered, but is instead all-inclusive of every type of election and elected office.[1] Section 2 itself contains *no* office-by-office list of the specific elective positions that are covered. Instead, Congress established the scope of Section 2 by employing in Section 2(a) two terms—"vote" and "voting"—that are specifically defined in Section 14(c)(1) of the Act to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, . . . casting a ballot and having such ballot counted properly with respect to candidates for public or party office." 42 U.S.C. Section 1973*l*(c)(1). These broad definitions clearly encompass elections for judges.

Section 2(a), then, establishes the all-inclusive scope of the elections covered by using these two statutorily defined terms and providing:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b) of this section.

In contrast, Section 2(b), in which the word "representatives" appears, does not serve the function of defining the scope of the offices covered by Section 2. In-

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[1] This Court has stated that the starting point of statutory interpretation is the language of the statute itself. *See Demarest v. Manspeaker*, 111 S. Ct. 599, 602 (1991).

stead, Section 2(b) defines the *manner* in which a violation of subsection (a) is established. Section 2(b) begins by stating "[*a*] *violation of subsection (a) of this section is established if* [the specified showing is made]." (Emphasis added). The remainder of Section 2(b) sets forth the substantive showing that must be made, and contains a proviso dealing with the significance of the extent to which members of the protected class have been elected to office.

There is no such thing, therefore, as an elective office "covered" in Section 2(a) that is not also "covered" by Section 2(b), since Section 2(a) specifically states that it is to be applied "as provided in subsection (b) of this section," while Section 2(b) specifically provides that it sets forth *how* "a violation of Section 2(a) is established." Given this statutory structure and language, there is no support for the conjecture that an entire category of elections covered by Section 2(a) could suddenly turn up missing in Section 2(b).[2]

Indeed, most of the language of Section 2(b) echoes the same broad phrasing found in Section 2(a). The first sentence of Section 2(b) refers broadly to "the political processes leading to nomination or election in the State or political subdivision"—phrasing which by its terms incorporates all electoral processes without exception. That sentence continues by referring to the opportunity enjoyed by members of the protected class "to participate in the political process"—again, no exclusion of or reference to any particular category of elections—"and to elect

[2] Under the Fifth Circuit's analysis, judicial elections are covered by Section 2 as long as *intentional* discrimination is proven, while challenges to all other categories of elections are not governed by any intent requirement. 914 F.2d at 625 n.6. It is impossible to find this distinction anywhere in the statutory language. In *Burlington Northern R. Co. v. Okla. Tax Commission*, 481 U.S. 454, 463-64 (1987), this Court unanimously reversed a Court of Appeals holding that would have read into a statute an intent requirement for some types of actions covered by the statute but not for others.

representatives of their choice." The phrase as a whole ("to participate in the political process and to elect representatives of their choice") clearly focuses on the actions and opportunities of the protected class and not on the specific categories of offices subject to the Act. It would be a strange method of drafting that would set about to exclude a category of elections from the statutory coverage by placing the all-important definitional term only at the end of a conjunctive clause in a long sentence that otherwise broadly defines the substantive standards in question.[3] A straightforward and natural reading of the statutory language requires the conclusion that Congress did not intend the word "representatives" to exclude judicial elections from Section 2's coverage.

B. The Word "Representative" in Section 2(b) Refers to All Elected Officials and Does Not Exclude Judges.

There is a much simpler explanation for Congress' use of the word "representatives" than that employed by the Fifth Circuit majority. The portion of subsection (b) in which the word appears was taken from *White v. Regester*, 412 U.S. 755 (1973), which refers to minority groups whose members have less opportunity than others "to participate in the political process and to elect legislators of their choice." *Id.* at 766. Congress substituted the word "representatives" for "legislators." As the Sixth Circuit said in *Mallory v. Eyrich*, 839 F.2d 275 (1988), "[i]t seems evident that Congress was seeking a broader word to make it clear that subsection (b) is not

[3] The parallel language defining the scope of Section 2 and Section 5 of the Act—the latter of which has been interpreted by this Court to encompass elections of state court judges, *Georgia Board of Elections v. Brooks*, 111 S. Ct. 288 (1990), *summarily aff'g Brooks v. State Board of Elections*, No. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court)—further establishes that Section 2 applies to judicial elections. This point is developed in the briefs of the petitioners and will not be discussed further here.

limited to legislative races." *Id.* at 279. Without pausing to list all of the covered offices by title—an unnecessary exercise since the scope of the Act is defined elsewhere—the drafters of Section 2 substituted a more generic term in place of the word "legislators."

The Fifth Circuit's holding hinges on its belief that the word "representatives" can have only one meaning, and that meaning necessarily excludes judges. 914 F.2d at 625-27. Political science literature refutes such a narrow and singular understanding of the concept of "representation." For instance, Professor Hannah Pitkin's highly-regarded work, *The Concept of Representation* (1967), notes that "[c]ourts, judges and juries have been discussed as representative organs of the state." *Id.* at 227. Pitkin offers several examples of how judges can be considered "representatives":

> From a formalistic standpoint, a judge is an agent of the state like all government officials. His pronouncements are not private expressions of opinion, but official utterances of the state. Hence he represents the state. In a democracy where all agencies of the government are servants of the sovereign people, the judge might be said to represent the people. From the "standing for" interpretation, he may represent by embodying the values of a society. From the doctrine that anyone whose commands are obeyed and whose leadership is accepted is a representative, a judge certainly represents. . . .

Id. at 116-117.

Use of the words "representatives" and "represent" with respect to judges are features of the historical writing on the Federalist and Jacksonian eras, the seminal moments in the establishment, respectively, of the federal and the elective state judiciaries. James Wilson, distinguished jurist and delegate to the Constitutional Convention, wrote of "[t]he extension of the theory and practice of representation through *all* the different de-

partments of the state" in America. 1 *The Works of James Wilson* 311 (R. McCloskey, ed. 1967) (emphasis added). Professor Edmund S. Morgan, writing about the development of state constitutions and the federal constitution in the United States, said this:

> A constitution superior to ordinary legislation could insure a strong position in government to the executive *and the judiciary* as well as the legislature, by making them all representatives of popular sovereignty and guaranteeing to them all a share in the power that supposedly emanated from the people.

E. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 260-61 (1968) (emphasis added). *See also*, G. Wood, *The Creation of the American Republic, 1776-1787* 456, 460, 596-99 (1969) (noting that American political thought of the late 1780s viewed all three branches of government as representatives of the people).

Many reformers of the Jacksonian era who favored the election of judges certainly considered judges chosen by the people to be representatives in some sense. Writing of that time, Charles M. Cook noted the belief of reformers that, through election, judges "would be made representative to the people and sensitive to their needs." C. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* 161 (1981).[4]

The Fifth Circuit's opinion suggested that judges can never be considered "representatives" because they occasionally must make decisions contrary to public will

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[4] *See also*, F. Green, *Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy* 279 (1930); K. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System* 103 (1979); Hall, "The 'Route to Hell' Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920," in *Ambivalent Legacy: A Legal History of the South* 229, 237-38 (D. Bodenhamer & J. Ely eds. 1984).

and may not favor any particular constituency in discharging their duties. 914 F.2d at 626. Of course, the same is true of any number of elected executive or quali-legislative officials whom the Fifth Circuit would consider to be "representatives," such as prosecutors, constables, civil service boards, tax assessors, recorders of deeds, and prothonotaries. Indeed, legislators take an oath to uphold the Constitution, and occasionally act against the public will in fulfilling that oath.

Moreover, judges sometimes do consider and translate the popular will into judicial decisions, for instance in the development of the common law or the determination of what constitutes cruel and unusual punishment. Thus, judges are "representatives" or agents of the public in the ongoing evolution of legal doctrine.[5] Elected judges can also be said to "represent" the choice of the voters as to who will best serve the public good in discharging the duties of the judiciary.

Thus, the use of the word "representatives" does not evidence an intent to exclude elected judges.

C. The Purpose of the 1982 Amendment Was to Broaden Section 2's Coverage, and the Legislative History Belies Any Intent to Exclude Judicial Elections.

Congress' purpose in amending Section 2 was to broaden the Act's coverage by eliminating any requirement of proving intentional discrimination. *Thornburg v. Gingles*, 478 U.S. at 35. The Fifth Circuit's holding that Congress, at the same time, narrowed the coverage of Section 2 to exclude an entire category of elections

[5] Indeed, in a recent letter to the federal district judge in *Clark v. Roemer*, No. 90-952, the case involving Louisiana trial and appellate judges, the attorney for the State defendants in both *Clark* and in *Chisom v. Roemer*, No. 90-757, Robert Pugh, wrote of one elected Louisiana judge who had retired and who "is no longer *representing* his former district" (emphasis added) (December 28, 1990 letter from Robert Pugh to Hon. John V. Parker, reproduced in the attached appendix).

simply cannot be squared with the well-documented congressional intent, and is unsupported by even a sliver of evidence in the legislative history.[6]

[6] The Fifth Circuit incorrectly relied upon an alleged "presumption" that Congress intended to incorporate the phrascology of cases holding the one-person, one-vote principle inapplicable to judicial elections. 914 F.2d at 628. None of those cases are cited in the legislative history of the 1982 amendment. *See Demarest v. Manspeaker*, 111 S. Ct. at 603-04 (declining to apply a presumption that Congress incorporated prior administrative and judicial decisions in a statute where there was no evidence Congress was aware of the prior interpretations and where the statutory language did not support the interpretation at issue). Moreover, the presumption, if applicable, supports plaintiffs, because it imputes to Congress knowledge only of "existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). Much more pertinent to the 1982 Section 2 amendment than the one-person, one-vote cases is the 1980 holding of the Fifth Circuit in *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980). There, the Fifth Circuit held that a racial vote dilution challenge could be maintained against at-large judicial elections under the Fourteenth and Fifteenth Amendments irrespective of the inapplicability of the one-person, one-vote rule. Congress' presumed awareness of *Voter Information Project* would indicate that discriminatory judicial elections are not excluded from the coverage of amended Section 2, especially given that Congress broadened the statute in 1982 so that a showing of intent as required in litigation under the Fourteenth and Fifteenth Amendments would not be necessary.

Moreover, the Senate Report cites a 1977 en banc decision of the Fifth Circuit in a successful vote dilution challenge to districts used to elect county boards of supervisors *and* justices of the peace (who are trial judges in Mississippi). *See* S. Rep. at p. 29 n.114, 31 n.121, citing *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977) (*see* 554 F.2d at 140 n.1 for description of offices at issue in *Kirksey*). *See also, e.g., United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 956 n.9 (5th Cir. 1978) (noting that districts at issue in vote dilution challenge were used to elect justices of the peace, among other officials). These and other vote dilution suits dealing with county boards of supervisors and justices of the peace in Mississippi were also specifically discussed in the testimony of several witnesses at the House and Senate hearings. *See* Part I.C, *infra*, for a discussion of this testimony.

To the contrary, the available legislative history supports the proposition that all elections, including judicial elections, remain within the coverage of amended Section 2. As stated in the Senate Judiciary Committee report accompanying the 1982 amendment, Congress amended Section 2 in order "to prohibit *any* voting practice, or procedure [that] results in discrimination" without regard to whether there is proof of discriminatory intent. S. Rep. 97-417, 97th Cong. 2d Sess. 2 (1982), *reprinted* in 1982 U.S. Code Cong. & Adm. News 177, 179 (emphasis added). *See Thornburg v. Gingles*, 478 U.S. at 43. While various lower court opinions[7] and the briefs of some of the parties in this Court discuss other aspects of the legislative history, *amici* focus here particularly on the congressional hearings held on the 1982 extension and amendment of the Voting Rights Act.[8]

In interpreting the Voting Rights Act, this Court has looked to the purposes of the Act and the forms of discrimination it was designed to remedy, including those described in the testimony of witnesses during the congressional hearings. *See, e.g., Perkins v. Matthews*, 400 U.S. 379, 387-389 (1971); *Allen v. State Board of Elections*, 393 U.S. 544, 563-569 (1969). At the 1981 and 1982 congressional hearings in both the House and the Senate, numerous minority witnesses and representatives of civil rights organizations testified about discrimination in judicial elections, presented examples of how vote dilution hampered the election of minority

[7] *See, e.g., Mallory v. Eyrich*, 839 F.2d at 278-80.

[8] *Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 3112, H.R. 3198, H.R. 3473, and H.R. 3498 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) ("House hearings"); *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 2d Sess. (1982) ("Senate hearings").

judges, and articulated the need for better minority representation on the bench.

Several of the witnesses gave testimony and statements concerning extensive pre-*Bolden* litigation over dilution of black voting strength in the drawing of districts used to elect Mississippi county supervisors, justice court judges (justices of the peace), constables, county school board members, and county election commissioners.[9] Mississippi State Senator Henry J. Kirksey described the outcome of one such lawsuit in 41-percent black Warren County, Mississippi, to respond to Senator Metzenbaum's questions concerning whether the use of the "results" test prior to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), had resulted in "proportional representation":

> In 1979, the Federal district court ordered into effect a plan which resulted in the election of one black county supervisor, one black justice of the peace, and two black constables—the first black elected officials in Warren County since reconstruction. Since there are five supervisors, justices of the peace, and constables from each district, we clearly did not obtain proportional representation.

Senate hearings at 669. Referring to this same litigation, a statement submitted by Robert M. Walker, Field Director of the Mississippi NAACP, noted that as a result of the litigation "a Black supervisor, a Justice Court judge and two constables were elected, giving Black Warren countians representation for the first time since the 19th century." House hearings at 2648.[10]

[9] In Mississippi, justice court judges, formerly known as justices of the peace, are judicial officers at the trial court level.

[10] *See also* House hearings at 1745 (testimony of Senator Kirksey in response to questioning by Representative Don Edwards, House Subcommittee Chairman, explaining that "we are able to elect two county supervisors, two justices of the peace, and some other officers" as a result of voting rights litigation in Hinds County, Mississippi).

Amicus Lawyers' Committee for Civil Rights Under Law submitted a report to both the House and Senate subcommittees which included a detailed description of the Mississippi lawsuits over county districting and made numerous specific references to the impact of the lawsuits on county justice of the peace elections.[11] The Senate Judiciary Committee Report cites one of these lawsuits in which the Fifth Circuit held that discriminatory lines used to elect county boards of supervisors, justices of the peace and other county officials were unlawfully dilutive of black voting strength.[12]

The hearings included examples of the difficulties faced in electing minorities to judicial office. A witness representing *amicus* MALDEF helped document the continuing impact of race in electoral politics by describing in detail how the local Democratic committee in Aransas County, Texas, engineered the election of a deceased person as justice of the peace in order to prevent the election of the first Mexican-American to that office.[13] Full-page newspaper advertisements, reprinted in the House hearings transcript, advised voters:

> THE NAME OF LAWRENCE MILLER, Candidate for Justice of the Peace, Precinct 1, will be on the Democratic Ballot on May 6th. You are entitled to vote for him even though he is now deceased. If Judge Miller receives a majority of the votes cast, the Aransas County Democratic Committee will convene and select a nominee whose name will be certified to be placed on the General Ballot for November.

[11] Report of the Lawyers' Committee for Civil Rights Under Law, *Voting in Mississippi: A Right Still Denied*, reprinted in House hearings at 499, 516-28. *See also* Senate hearings at 673 (prepared statement of Sen. Kirksey, noting submission of report to Senate subcommittee), 1228 (prepared statement of Frank R. Parker, Esq., summarizing report). The report is cited at several points in the Senate Report accompanying amended Section 2. *See* S. Rep. at 10 n.21; 10 n.22; 13 n.35; 51 n.177.

[12] *Kirksey v. Board of Supervisors of Hinds County* (cited in S. Rep. at 29 n.114, 31 n.121).

[13] House hearings at 930 (testimony of Joaquin Avila, Esq., of *amicus* MALDEF). See also id. at 940-42 (prepared statement of Avila); 1253 (testimony of Ruben Bonilla, president of petitioner LULAC, describing same election).

House hearings at 1010. Moreover, witnesses specifically noted the adverse effect of at-large judicial elections on the potential for minority electoral success. Mississippi NAACP Field Director Robert Walker described an attempt by the Mississippi legislature to change from district-based to at-large justice court elections, and stated "[i]f accepted, this obvious attempt to dilute the Black vote would set this State back 100 years." House hearings at 2647. Mississippi State Representative Fred Banks decried this same effort to establish "an at-large system for the election of justices who are now elected by district in the counties." House hearings at 550. The record also contains references to the role played by polarized voting in judicial elections.[14]

Witnesses also testified about minority aspirations to judicial office in the context of the Voting Rights Act. From the first black elected state judge in majority-black Sumter County, Alabama, Honorable Eddie Hardaway, Jr., Congress heard about the importance of the Act in terms of the racial integration of the bench:

[14] *E.g.*, House hearings at 949 (prepared testimony of Avila, describing how a minority candidate for a Texas Court of Appeals judgeship was defeated by racially polarized voting in a 1980 election); Senate hearings at 306 n.33 (prepared statement of Vilma Martinez, President and General Counsel of MALDEF, noting that evidence of polarized voting in justice of the peace elections was submitted to the court in *Seamon v. Upton*, E.D. Tex. No. P-81-49-CA, the Texas congressional reapportionment challenge); House hearings at 260 (prepared statement of Dr. James W. Loewen, Associate Professor of Sociology, University of Vermont, referring to racial polarization in an Alabama judicial race).

> I sit here today, as living proof that a poor, rural black country boy in Alabama can, as a result of the Voting Rights Act, be elected to public office. Without a Voting Rights Act, there is no doubt in my mind that I would not be the district judge of Sumter County.

House hearings at 825.[15] *See also* House hearings at 571 (testimony of Bennie Thompson, contrasting fairness in the administration of justice before and after his election as mayor and judge of Bolton, Mississippi, in response to questioning by Rep. Edwards).[16]

Witnesses made it clear that judicial elections were considered an important target for efforts to increase minority representation in elected office. Describing offices being targeted by black candidates in Sumter County, Alabama, Judge Hardaway stated:

> In 1982, most major offices in county government will be up for grabs. That is, the probate judge, tax assessor, tax collector, circuit clerk, sheriff, and three county commission[ers] will be up for re-election. As it now stands, there is a strong possibility that blacks may be elected to some of these positions.

House hearings at 825. Adolfo Alvarez, a Frio County, Texas commissioner, told the House subcommittee that "[b]ecause of the existence of the Voting Rights Act and our work in the comunity, we now have two Mexican American county commissioners and three Mexican American justices of the peace out of four." *Id.* at 1188.

Additional witnesses pointed to the lack of minority representation on the bench as an evil that had persisted despite advances made under the Voting Rights Act to date. George State Senator Julian Bond noted that "even though Blacks now represent over 26 percent of the Georgia population, they continue to be underrepresented in the halls of the General Assembly, the City Halls, the County courthouses, and the Judicial Chambers of our state." *Id.*, p. 234 (prepared statement). Professor Brian Sherman, in discussing evidence of "low or no [black] representation in county government" in Georgia, pointed out that "[o]f the 47 counties for which we have information, only 1 reports the election of a black judge to superior court since the passage of the Voting Rights Act." House hearings, p. 574.[17]

[15] *See also* Senate hearings at 748 (testimony of Abigail Turner, Esq., referring to Judge Hardaway's election).

[16] As Mr. Thompson explained, in towns under 10,000 in Mississippi at the time, the mayor also served as city judge. Under the Fifth Circuit's holding, elections would be covered by Section 2 only with respect to the mayor's office and not with respect to the judicial position.

These references in the hearings to judicial elections are consistent with the understanding that the Voting Rights Act and its provisions, including Section 2, covered all elections. No witness and no member of Congress at any time suggested that judicial elections should be excluded from Section 2's coverage. All of this belies the notion that Congress intended to narrow the Act to exclude judicial elections at the same time it was broadening the Act to better protect the victims of racial discrimination.

II. NOTHING INDICATES CONGRESS INTENDED SECTION 2 TO APPLY ONLY TO ELECTIONS FOR APPELLATE COURT JUDGES AND NOT TO ELECTIONS FOR TRIAL COURT JUDGES.

Part I of Judge Higginbotham's concurring opinion concluded that Congress intended to include judicial elections within the ambit of Section 2. In Part II, however,

[17] *See also Voting in Mississippi: A Right Still Denied*, reprinted in House hearings, at 503 (listing numbers of blacks elected to Mississippi Supreme Court, county courts, and justice courts as of 1980). For additional references to judicial elections in the House and Senate hearings, *see* House hearings at 38, 193, 239, 280, 502, 763, 804, 806, 937, 1182, 1205, 1515, 1528, 1535, 1839; Senate hearings at 777, 788-89.

that opinion concluded that while elections for appellate court judges are covered, elections for trial judges are not. That portion of the opinion did not discuss the language of the statute or congressional intent, and is, at most, an explication of what its sponsors believe Congress *should have* intended with respect to Section 2 and trial judges. As to the real issue of what Congress *did* intend, there is absolutely no indication of a desire to include elections for appellate judges while exempting elections for trial judges from Section 2's coverage. As demonstrated in Part I of this brief, the language, purpose and legislative history establish that no elective office or category of elections is excluded from the scope of Section 2. Indeed, the fact that Section 5 covers elections for trial judges, *see Georgia Board of Elections v. Brooks*, also makes it highly unlikely Congress intended to exclude trial judges from the coverage of Section 2.

The concurrence concluded that the state interests behind retaining electoral districts geographically coextensive with trial court jurisdiction are so compelling that they *always* outweigh the interests Congress sought to protect with Section 2, and are therefore immune from Section 2's ban on racial discrimination.

> We are persuaded that, for purposes of the Voting Rights Act, because the fact and appearance of independence and judicial fairness are so central to the judicial task, a state may structure its judicial offices to assure their presence when the means chosen are undeniably directly tailored to the objective. The choice of means by Texas here—tying elective base and jurisdiction—defines the very manner by which Texas' judicial services are delivered at the trial court level . . . . Stated in traditional Fourteenth Amendment terms, there is compelling necessity sufficient to overcome the strict scrutiny of state acts impinging upon a fundamental interest.

914 F.2d at 646. This is a critique of the potential remedy of subdistricting, by which judges are elected

from subdistricts within a judicial district and hear cases from throughout the district. With subdistricts, there would be, in the words of the concurrence, no "tying [of] elective base and jurisdiction." Sections C and D of part II of Judge Higginbotham's opinion are largely a discussion of what he perceives to be the drawbacks of subdistricting. The concurrence cited the so-called "single-member office" exception articulated in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), in support of the exclusion of trial judges from Section 2's coverage.

This section of the brief will first discuss how any state interests that purportedly underlie at-large trial judge elections can be accommodated within the context of Section 2 enforcement inasmuch as remedies other than subdistricting are available. Second, it will demonstrate that even if subdistricting were the only remedial option, the state's interests would not be threatened. Third, it will show the inapplicability of any "single-member office exception." Finally, it will discuss Judge Higginbotham's mistaken focus on responsiveness and his failure properly to consider the congressional purposes manifest in Section 2.

A. The Appropriateness of Subdistricting as a Remedy Is Irrelevant to the General Applicability of Section 2 Inasmuch as a State May Choose Remedies Other Than Subdistricting That Adequately Protect Any Interests It Has in At-Large Trial Court Elections.

Even if Judge Higginbotham's belief about the undesirability of subdistricting were correct, that has nothing to do with the *general applicability of Section 2* to elections for trial judge. Other remedies are available to the states that can protect any interests a state may have in retaining a congruence between electoral base and jurisdiction.

The matter of the appropriate remedy in a vote dilution case is first left to the responsible state officials.

White v. Weiser, 412 U.S. 783, 794-95 (1973). Those officials could choose from a number of options, any of which would hold out the promise of remedying racial discrimination yet retaining a coextensiveness between electoral base and jurisdiction. The options include "limited voting," which maintains at-large elections but alters other election features—the main alteration being a reduction in the number of votes available to each voter—to prevent white voters from sweeping all of the seats and to give minority voters an opportunity to elect candidates of choice to some of the judgeships. *See Dillard v. Town of Cuba*, 708 F. Supp. 1244 (M.D. Ala. 1988) (approving a consent decree adopting limited voting as a remedy in a Section 2 challenge to at-large elections); Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.C.L. 173, 223-31 (1989). They include "cumulative voting," which retains at-large elections and permits each voter to have as many votes as there are seats, but allows the voter to cast multiple votes for a single candidate. *Id.* at 231-36. They include the creation of smaller and racially fair judicial election districts within a pre-existing district, with cases arising from the new election districts assigned only to judges chosen from those election districts (with judges, of course, being able to help out with overloaded dockets of judges from other election districts just as visiting judges do now in Texas and most other states).[18] The remedial options might include, in a given case, the realignment of counties among existing judicial districts to change the demographics of

[18] The *LULAC* majority and concurring opinions assumed that all subdistricting systems, and all remedial election districts, would necessarily be "single-member." 914 F.2d at 623 (majority opinion); *id.* at 633 (Clark concurrence); *id.* at 649-51 (Higginbotham concurrence). That is not the case. Particularly in urban areas, it is frequently possible to draw majority black or Hispanic election districts that are multi-member and would elect several judges.

the districts, with judges hearing cases arising only from their realigned district. *See SCLC v. Siegelman*, 714 F. Supp. 511, 512 (M.D. Ala. 1989) (challenging the boundary lines between existing judicial districts).

Of course, the initial choice as to the best form of electing judges in the wake of a finding of a Section 2 violation belongs to the states themselves. In the weighing of the various state interests, some may choose subdistricting and some may choose other remedies. At the present time, the only issue before this Court is whether Section 2 is generally applicable. The appropriateness of subdistricting in light of any countervailing state interests is not an issue before this Court, and should be addressed only if and when it is.

B. Even If the Appropriateness of Subdistricting Were Somehow Relevant, the State Interests Identified by the Concurring Opinion Would Not Be Infringed by Subdistricting and Do Not Outweigh the Congressional Purpose of Eliminating Discrimination in Elections.

Even if the concurrence's view of the appropriateness of subdistricting were relevant, it is based upon asserted state interests that would not be infringed by subdistricting. Before discussing those, it is important to note that Congress, in amending Section 2, said the state's policy behind a particular electoral system is only one of many factors to be considered. S. Rep. at 29 and n. 117. The Senate Report—which this Court has said is the "authoritative source" for determining the congressional intent behind Section 2, *Thornburg v. Gingles*, 478 U.S. at 43, n.7—made it abundantly clear that the application of a state's policy in support of a given election system "would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. at 29, n. 117. Certainly, if state policy cannot vitiate an otherwise successful Section 2 case, neither can it banish a whole category of elections

from the scope of Section 2 without some congressional indication that the category is excluded.

The state interest that Judge Higginbotham believed would be unalterably compromised by subdistricting is what he called "the fact and appearance of independence and fairness." 914 F.2d at 646.[19] However, nothing suggests that judges elected from subdistricts would be less independent and fair than judges elected from the current system. It would be racially insulting for the State of Texas to believe that judges elected by minority voters will be less independent and fair than the current judges, almost all of whom are white and are elected by white voters with little say from minority citizens. Indeed, if there is any unfairness, it comes from the present system that robs minority voters of an equal vote, and perpetuates a nearly all-white judiciary in the midst of a multiracial society.

Also, the state has no basis to contend that a judge elected from one subdistrict would be biased, or would appear biased, in a case involving a litigant from his or her subdistrict and a litigant from another. If Texas were concerned about that, it would not allow, for instance, a judge from Dallas to sit in a case in which

[19] Judge Sam Johnson's dissent from the Fifth Circuit decision in *LULAC* demonstrates that Texas does not really believe its state interests are unalterably compromised by subdistricting. As Judge Johnson states, the Texas Constitution authorizes subdistricting for justices of the peace and subcounty districts for district courts. 914 F.2d at 669 (Johnson, J., dissenting). Moreover, it should be noted that the district court in *LULAC* found the state's asserted interests to be unpersuasive. That is a finding of fact subject to the clearly erroneous standard of Rule 52, F.R. Civ.P.; *Thornburg v. Gingles*, 478 U.S. at 77-79. The United *States*, as *amicus curiae* in the en banc Fifth Circuit, said "there is evidence in this record which undermines the notion that a remedy which would create subcounty districts would result in biased decisionmaking or even the appearance of biased decisionmaking." Supplemental Brief for the United States as *Amicus Curiae*, *LULAC v. Mattox*, No. 90-8014 (5th Cir.).

one litigant is from Dallas and the other from Houston. No such prohibition exists in state law.[20]

What the state does know is that under a remedial plan minority voters would have a better opportunity to elect candidates of their choice to office, and that some of those candidates would most likely be minorities. But an objection to the application of Section 2 based on such considerations would be intolerable.

Judge Higginbotham also contended that the legitimacy of judicial decisions might come into question because a judge elected from a portion of the county would be making decisions "for the county as a whole." 914 F.2d at 650. This implies that no decision of a trial judge is legitimate unless it is made by a judge chosen by all of the voters. If that were the case, visiting judges would never be allowed to hold court in an area from which they were not elected. Retired judges would never be allowed to step in to help out with overload dockets because the voters had not elected them to a current

[20] Judge Higginbotham's opinion said the State eliminated the appearance of bias in the present system by creating an elaborate set of rules controlling venue. He also said that no similar system of venue rules exists for subdistricts. 914 F.2d at 651. The point about venue rules is that they provide a set of neutral guidelines to determine whether the case should be tried in one district or another (and before a judge from one district or another), thus preventing arbitrary decisions about the matter to be made by someone interested in favoring one litigant over the other. In a subdistricting system, as under the present system, there would be a neutral system of assigning cases to judges, thus preventing arbitrary case-assignment decisions from being made by someone interested in favoring one litigant over the other. Once a decision regarding venue is made according to neutral guidelines, the State of Texas has indicated no concern about having a judge elected in Dallas hear a case involving one litigant from Dallas and another from Houston. Similarly, once a case assignment is made according to neutral guidelines, the State will have no difficulty with a judge elected out of one subdistrict hearing a case involving one litigant from that subdistrict and one from another.

term. Interim judges could not be appointed to fill vacancies prior to an election.[21] Thus, it is clear that the state's interest in the legitimacy of judicial decisionmaking would not be impaired by subdistricting.

All of this indicates that, even if subdistricting were the issue before this Court, the state's interests would not be undermined by the use of a subdistricting remedy.

C. No "Single-Member Office" Exception Removes Trial Judges from the Coverage of Section 2.

The reasoning of the "single-member office" exception articulated by a 2-1 panel majority of the Second Circuit in *Butts v. City of New York* has never been adopted by this Court, and it seems doubtful it would be.[22] Even if it were, it is inapplicable here. By its own terms, the *Butts* "single-member office" exception applies only to offices of which there is one office holder in the jurisdiction, such as a mayor. This notion is applicable to at-large elections only in the logical sense that a mayor cannot be elected other than at-large.

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[21] Subdistricts were adopted as a court-ordered remedy in the Secton 2 case involving trial judges in Mississippi, *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). A number of black judges were elected as a result, but there is no evidence that the Mississippi judicial system has suddenly become infused with a threat to what Judge Higginbotham called "the fact and appearance of independence and fairness."

[22] In *Butts*, the panel majority said runoff requirements for what it called "single-member offices," such as mayor, may not be challenged under Section 2. This holding is inconsistent with the language of Section 2 and the legislative history. As the Solicitor General has stated, the language of Section 2 makes no exception for majority vote runoff requirements "either for single member offices or other types of elected positions." Brief for the United States as Amicus Curiae in *Whitfield v. Clinton*, No. 90-383 (pet. for cert. denied 2/25/91), at 11. The Senate Report accompanying the 1982 amendment indicates that Section 2 applies to majority vote runoff requirements. S. Rep. at 6, 10, 22, 29-30. Thus, it is doubtful that *Butts* was correct when it said runoff requirements for "single-member offices" are immune to Section 2.

By contrast, there are a number of trial judges elected in each of the challenged judicial election districts in Texas. It is not necessary that they all be elected by an at-large, winner-take-all system. The fact that they often exercise decisionmaking power by themselves does not make them "single-member offices" for purposes of *election*. Under the Voting Rights Act, it is the electoral structure that is important, and Congress has never indicated that the function of the office can insulate racially exclusionary election schemes from challenge. If function could preclude coverage of the Act, discriminatory at-large elections for city commissions, in which each commissioner exercises independent decisionmaking authority over a particular area of city operations, might be shielded from challenge. *See, e.g., Buchanan v. City of Jackson*, 708 F.2d 1066, 1067-68 (6th Cir. 1983). That has never been the law.

The "single-member-office" argument, then, as applied to judicial districts that have multiple judgeships, is merely another way of expressing the conclusion that trial judges should not be elected from subdistricts. This remedial concern, again, is not dispositive of Section 2's coverage.

D. The Concurrence Failed to Consider the Interests in Non-Discriminatory Elections That Congress Attempted to Further Through Section 2, and Instead Focused Exclusively on the Issue of Responsiveness.

Judge Higginbotham's balancing of the state's alleged interests was further skewed by his failure to perceive the true nature of the countervailing interests in non-discriminatory elections that Congress has sought to vindicate through Section 2. The Higginbotham concurrence embraced the erroneous notion that Section 2's sole function is to increase minority impact on the day-to-day decisions of governmental officials, including judges, and concluded that subdistricting would not help most mi-

nority *litigants* appear in front of minority judges. 914 F.2d at 649-50.[23]

To the contrary, Section 2's purpose is not simply to increase the extent to which minority interests are considered in government decisions—in this instance, decisions involving individual litigants—but is to give minority voters a fair opportunity to elect candidates "of their choice" (to use the language of Section 2). When voters—be they white, black or Hispanic—vote for judicial candidates, they rarely vote in the expectation that they someday will appear as litigants before the judges who are elected. Instead, they vote for the candidates they believe will do the best job of administering justice. The purpose of Section 2 is to give minority voters a meaningful voice in those electoral decisions.

The legislative history of the 1982 amendment made it clear that the responsiveness of governmental officials to minority interests is a factor of secondary importance in Section 2 cases, and said that "[u]nresponsiveness is not an essential part of plaintiff's case" under Section 2. S. Rep. at 29 and n.116 (1982). Thus, even if minority interests are already fully taken into account in governmental decisions, Section 2 prohibits an election system that denies minority voters an equal and fair opportunity to elect candidates of their choice.

In summary, Judge Higginbotham is wrong to suggest that the state's legitimate interests will be undermined by subdistricting. Moreover, he fails to balance those interests against the fundamental concern protected by Section 2, and that is the right of minority voters to elect candidates of choice free from racially discriminatory election structures.

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[23] Of course, as a result of the present election districts, very few litigants, minority or white, appear in front of minority judges because there are so few.

III. NOTHING INDICATES CONGRESS INTENDED TO EXCLUDE FROM SECTION 2'S COVERAGE AT-LARGE JUDICIAL ELECTIONS FROM DISTRICTS CO-EXTENSIVE WITH THE JURISDICTIONAL AREA SERVED BY THE JUDGES ELECTED.

Judge Clark's concurrence on behalf of himself is similar to Judge Higginbotham's in that Judge Clark believes the state's interest in what he calls "due process neutrality" should immunize from Section 2's coverage all elections from judicial districts that are geographically coextensive with the jurisdictional area served by the judges elected. Judge Higginbotham would carry that principle forward to exclude all trial judge elections. By contrast, Judge Clark would use it to exclude elections for both trial and appellate judges if the election district and the jurisdiction are coextensive, while he leaves open the possibility of a Section 2 challenge to an election district, either trial or appellate, smaller than the jurisdictional area served by the judge elected.

There is absolutely no reason to believe Congress intended such an exception to Section 2's coverage. One of the primary electoral devices Congress intended to combat with Section 2 is discriminatory at-large elections. S. Rep. at 30. Section 5, of course, covers at-large elections where electoral base and jurisdiction are equivalent, and it is doubtful Congress intended to exclude from Section 2's scope a type of election covered by Section 5. *See Georgia Board of Elections v. Brooks.*

Moreover, Judge Clark's view suffers from the same problems as Judge Higginbotham's. They are both based on a belief that the election district and the jurisdictional area must be equivalent to insure what Judge Clark calls "due process neutrality." As mentioned in the discussion of Judge Higginbotham's opinion, that view erroneously assumes that subdistricting is the only available remedy. Also, as stated previously, it wrongly assumes that the state's interest in due process neutrality will be undermined by subdistricts even if they were the only available

remedy, and it fails to consider the overriding congressional purpose of eliminating racial discrimination in all elections.

For all of these reasons, Judge Clark's reasoning, like Judge Higginbotham's, provides no basis for sustaining the judgment below in the *LULAC* litigation.

CONCLUSION

For these reasons, the judgment of the court below in these cases should be reversed.

Respectfully submitted,

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March 4, 1991

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APPENDIX

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Robert G. Pugh, Jr.
Lamar P. Pugh

December 28, 1990

Honorable John V. Parker
Chief Judge
United States District Court
Middle District of Louisiana
707 Florida Street
Baton Rouge, Louisiana 70801

Re: Plaintiffs' Motion to the Three-Judge Court To Prevent Judges from Holding Office in the Judgeships for Which No Candidate was Elected Because the Injunction of the United States Supreme Court
Clark v. Roemer, No. 86-435, Section A
U.S. District Court for the Middle District of Louisiana

Dear Judge Parker:

I have been able to determine that the only individual judges who might be affected by the outcome of the captioned motion would be:

Judge James H. Boddie, Jr.
Fourth Judicial District, Division G

Judge Arthur J. Planchard, Jr.
Fourteenth Judicial District, Division E

Judge Charley Quienalty
Fourteenth Judicial District, Division G

Commercial National Tower, Suite 2100
333 Texas Street, Shreveport, Louisiana 71101-5302
Telephone (318) 227-2270 • Telecopier (318) 227-2273

Judge Hawsey, who would have otherwise been affected, retired, he is no longer representing his former district, however, he is serving as an ad hoc judge without a district designation on a series of asbestos cases.

By copy of this letter to Mr. McDuff and Mr. Johnson, I am advising him of my findings.

Yours very truly,

/s/ Robert G. Pugh
ROBERT G. PUGH

RGP/mp

cc: Robert B. McDuff, Esquire
Ernest L. Johnson, Esquire

No. 90-813 and No. 90-974

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSN., et al.
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, et al.
Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, et al.
Respondents.

On writ of certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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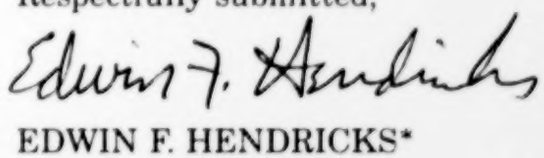
MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

The American Judicature Society was founded in 1913 by Roscoe Pound, John H. Wigmore, and others dedicated to improving the administration of justice throughout the United States. Among its goals, the Society seeks to improve the quality and diversity of state-court judges by promoting merit selection as the method for choosing such judges. The Society has a national membership.

It seeks leave to file an *amicus* brief in this case to call to the Court's attention important facts about merit selection which has been adopted in whole or in part by a majority of states as the method for selecting highly qualified candidates to fill judicial offices.

The Society has undertaken a good faith effort to obtain the consent of all parties necessary to file this brief without motion. Although all parties have orally consented to the filing of this brief, the Society had not received all such consents in writing prior to the printing of the brief. Should the Society receive such written consents prior to filing, it will file the consents with the clerk's office. The Society has not yet received the written consents of The League of Latin American Citizens, Jesse Oliver, and the Attorney General of Texas.

Respectfully submitted,



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On writ of certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The American Judicature Society was founded in 1913 by Roscoe Pound, John H. Wigmore, and others dedicated to improving the administration of justice throughout the United States. Among its goals, the Society seeks to improve the quality and diversity of state-court judges by

promoting merit selection as the method for choosing such judges.

The cases before the Court do not concern application of the Voting Rights Act to the merit-based selection of judges, and the Society takes no position on the application of the Act to the selection of judges through at-large, competitive elections. But because the Court's decision might be used to question the validity of merit selection systems now being used in a majority of the states, the Society files this *amicus* brief to inform the Court of the operation and spread of merit selection systems and to explain why the Court should not decide the present controversy in a manner that implicates judicial choice by merit selection.

SUMMARY OF ARGUMENT

Merit selection provides a superior method for selecting state judges. Merit selection systems require state executives to appoint judges from a short list of only the most highly qualified candidates nominated by non-partisan commissions. This procedure increases the quality of state court judges, makes them less susceptible to political influences, results in greater representation of minorities and women on state court benches, and enhances the legitimacy of the courts in the eyes of the public. The benefits of merit selection have led thirty-three states to adopt some form of merit selection in the last fifty years.

The Voting Rights Acts does not apply to merit selection procedures because such procedures are not elective. A system under which the state executive makes judicial appointments from a pool of qualified candidates, as to which citizens have no elective voice, simply does not result in voters of one class receiving "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973 (1988). And, although many merit selection systems grant the public a form of popular

veto over judges through periodic retention elections, neither do such elections result in the election of public representatives within the meaning of the Act because Judges removed through retention elections are replaced by executive appointment, not by popular election. Therefore, in deciding the cases before it, the Court should do nothing to suggest that the Voting Rights Act applies to merit selection of judges by the states.

ARGUMENT

A. Merit Selection Is A Superior Method For Selecting State Judges.

Albert Kales, the Society's first director of research, formulated the original merit selection proposal in 1914. For the next several years the Society refined and expanded the proposal and it was subsequently endorsed by The American Bar Association in 1937. In 1940, Missouri became the first state to adopt merit selection. Under its most traditional form, merit selection calls upon a non-partisan nominating commission to select qualified candidates for a judicial opening. The state executive is required to fill the judicial vacancy from among the limited group of candidates nominated by the commission. Under most merit plans, when the judicial term of office expires and at regular intervals thereafter, the judge is subject to a retention election at which he or she runs unopposed on the basis of his or her judicial record. If the judge is not retained by the public, the vacant seat is filled by appointment through the same merit selection process. American Judicature Society, *Model Judicial Selection Provisions* (1985). This approach to judicial selection preserves the appointment prerogative of the executive and the safeguards of public approval, while ensuring that persons appointed are well qualified for the bench.

Merit selection provides many benefits, the foremost being an enhanced quality of state judges. Non-partisan commissions which nominate judicial candidates under

merit selection systems are charged with seeking out the best judicial talent available. State executives must make their appointments from candidates so identified. This process, while not eliminating political considerations entirely, places greater emphasis on judicial qualifications than an unfettered political appointment system or a general competitive election. A 1979 poll of jurisdictions with merit selection revealed, almost without exception, that judicial quality had improved. American Judicature Society, *Judicial Selection Update: How Commissioners Rate Their Own Judicial Selection Plans* (1979).

Merit selection also makes the judiciary more independent from political influences and public pressure. Judges chosen through merit selection need not initially engage in the overtly political activities of judges selected through public elections, such as campaigning for office, aligning themselves with particular political parties, and soliciting campaign funds. And, because judges appointed through merit selection generally have a greater assurance of extended tenure, political factors and public opinion play less of a role in their decisions.

Merit selection systems also provide more frequent judicial opportunities to minorities and women. Studies recently completed by the Society show that of the 20 black jurists currently serving on state courts of last resort, 10 were chosen through merit selection, 7 through pure appointment by the executive, 2 through legislative appointment, and 1 through popular election. American Judicature Society, *Black Justices Currently Serving On State Courts of Last Resort: Methods of Initial Selection* (September 1990). *See also*, Fund for Modern Courts, Inc., *Success of Women and Minorities in Achieving Judicial Office: The Selection Process* 69 (Dec. 1985) ("merit selection produced the highest percentage of women and minorities to reach the bench of the six methods studied."). In Florida, where appellate judges are chosen by merit selection and trial judges are elected, "nineteen out of twenty-three black judges . . . came to the bench through the merit selection process." Overton, *Trial Judges and Political Elections: A Time For Re-examination*, 2 U. Fla. J. of L. & Pub. Pol'y. 9, 20 (1988-89).

Similarly, of the 35 women currently serving on state courts of last resort, 17 achieved the bench by merit selection, 10 by executive appointment, 4 by legislative appointment, and 4 by public election. American Judicature Society, *Women Justices Currently Serving on State Courts of Last Resort: Methods of Initial Selection* (Sept. 1990); Fund for Modern Courts, Inc., *supra*. In Florida, 41 of 71 women judges came to the bench through merit selection appointment. Overton, *supra*, at 20.

The benefits of merit selection are evidenced by the number of states that have adopted such a system in the last half-century. Missouri began the shift when it established a merit selection system in 1940. Since then, thirty-three states and the District of Columbia have adopted a form of judicial merit selection to choose some or all of their judges.[1] Indeed, with only one exception, every state which has changed its judicial selection system in the last forty-one years has changed to merit selection.[2]

B. Section Two Of The Voting Rights Act Does Not Apply To Merit Selection.

The gravamen of a claim under the Voting Rights Act is that members of a protected class have "less opportunity than other members of the electorate to participate

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[1] The states include Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

[2] The lone exception is Georgia, which switched from partisan to non-partisan elections in 1983.

in the political process and *to elect representatives of their choice*." The Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (1988) (emphasis added). While the Court may determine in these cases that the Voting Rights Act applies to contested, at-large judicial elections, the Act cannot apply to the merit selection of judges. Merit selection systems grant the electorate no direct voice in filling judicial vacancies. Rather, judges are appointed by the executive branch from a pool of candidates nominated by a non-partisan commission. No voter in a protected class has less say about the choice of a judge than other voters. Thus, the Voting Rights Act, by its very terms, has no application to merit-based judicial appointments.

Lower federal courts have so held. In *Williams v. State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988), Illinois voters challenged state methods for selecting judges under section two of the Act. The court found that the complaint stated a claim as to judges who were selected through public elections, but dismissed the claim as to judges who were appointed. The court recognized the fundamental distinction under the Act between systems that fill vacancies through public elections and those that fill vacancies through appointment:

> By its very terms, the Act extends only to mechanisms involved in the election of representatives. However, the people of Cook County do not elect the Associate Circuit Court judges; they are appointed by the regular Circuit Court judges. Because Associate Circuit Court judges are not elected representatives of the people within the plain meaning of the Act, we hold that the plaintiffs cannot challenge the appointment of Associate Circuit Court judges. Though the plaintiffs contend that full relief requires reappointment of all Associate Circuit Court judges by properly elected Circuit Court judges, we cannot extend coverage of the Voting Rights Act beyond its terms. The Voting Rights Act covers elected officials only. Associate judges are appointed officials.

Williams, 696 F. Supp. at 1568-69; *see also Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1357-58 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 2589 (1990) (considerable doubt as to whether section 2 applies to appointive offices); *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir. Unit B 1981), *aff'd mem. sub nom. Hightower v. Searcy*, 455 U.S. 984 (1982) (appointive system for school board did not implicate Voting Rights Act); *Irby v. Fitz-Hugh*, 693 F. Supp. 424, 435 (E.D.Va. 1988) (same). The Society believes that the Act was applied correctly in *Williams*, and requests that this Court say nothing in its disposition of the cases at bar to suggest that the Act applies to appointive systems such as merit selection.

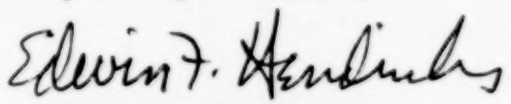
C. The Voting Right Act Should Not Be Applied To Retention Elections.

Merit selection is an appointive process, but many merit selection systems provide the public with a voice in retaining judges through popular vote. Retention elections function as a kind of popular veto, allowing the public to dismiss a judge who has already been appointed but providing voters with no right to select judges of their choice. Judges dismissed through retention elections are replaced by judges appointed by the executive through the merit-based selection process, with the voters having no voice in the candidates nominated or selected. Thus, retention elections do not deny protected classes the right "to elect representatives of their choice" within the terms of the Voting Rights Act, 42 U.S.C. § 1973 (1988). Because the retention aspect of merit selection systems is not before the Court in the present cases, the Society requests that the Court say nothing in its disposition of these cases which would suggest that retention elections are subject to the provisions of the Voting Rights Act.

CONCLUSION

For the above reasons, the American Judicature Society respectfully requests the Court not to implicate judicial choice by merit selection in its disposition of these cases.

Respectfully submitted,



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In The

Supreme Court of the United States

October Term, 1990

HOUSTON LAWYERS' ASS'N, ET AL.,

v. *Petitioners,*

THE ATTORNEY GENERAL OF TEXAS, ET AL.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,

v. *Petitioners,*

THE ATTORNEY GENERAL OF TEXAS, ET AL.

RONALD CHISOM, ET AL.,

v. *Petitioners,*

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA

v. *Petitioner,*

CHARLES E. ROEMER, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

I. Whether vote dilution challenges to state judicial elections are so different from traditional vote dilution cases that one cannot reasonably conclude that Congress intended to make judgeships subject to the 1982 amendment.

II. Whether vote dilution remedies are inherently inappropriate for state trial court judges.

III. Whether vote dilution remedies are inappropriate for state court judges because they would undercut the independence of the judiciary and violate the principle of separation of powers.

IV. Whether other possible vote dilution remedies are equally inapplicable and inappropriate in the case of judges.

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INTEREST OF THE STATE OF GEORGIA

The consolidated appeals in this case involve questions concerning the application of vote dilution principles of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, to state judicial elections. Claims of the same sort that are presented in these cases have been asserted against agencies and officers of the State of Georgia. See *Tyrone Brooks, et al. v. State Board of Elections, et al.*, Case No. CV288-146 (S.D. Ga., filed July 13, 1988). The plaintiffs there claim that the existing circuits for electing judges of the State's superior courts, which are the trial courts of general legal, equitable and felony jurisdiction, should be subjected to liability and remedies under Section 2. Specifically, the plaintiffs there claim that the existing circuits should be subdistricted into single member districts; that the State's majority vote requirement should be eliminated; and that incumbent judges should be compelled to run against one another, rather than for separate designated seats.

The outcome of the appeals in the instant case will be of great significance to the resolution of the similar claims pending in the United States District Court for the Southern District of Georgia. Moreover, the outcome of this case would affect whether similar claims might be asserted against other trial courts in the State of Georgia, and whether such claims might also be asserted against the Georgia Court of Appeals and the Georgia Supreme Court.

The State of Georgia thus has the utmost interest in the outcome of the present appeals. Amicus is of the firm belief that the Fifth Circuit Court of Appeals' rulings here

were correct, that they should be affirmed, and that Section 2 of the Voting Rights Act should not be extended to apply vote dilution theories to state judgeships.

The State of Georgia as amicus believes that a thorough statutory analysis and review of the legislative history behind the 1982 amendment to the Voting Rights Act, has been properly made by the Fifth Circuit and by other briefs filed with this Court in support of affirmance. While the State of Georgia agrees with those arguments, they will not be reiterated here. Rather, the State of Georgia wishes to bring to the Court's attention several other matters that amicus believes weigh against the extension of vote dilution principles to state court judgeships, and particularly trial court judgeships.

SUMMARY OF ARGUMENT

It is undisputed that the testimony before Congress concerning the need to amend Section 2 to create a cause of action for vote dilution related *exclusively* to traditional legislative type representative bodies – state legislatures, county commissions, city councils, and the like. Not a single witness before either the House or the Senate Committees that considered the amendment ever suggested that vote dilution principles should be applied to judges *or* that there was any need for such a drastic federal remedy in the case of judgeships.

As the Supreme Court determines whether, in its judgment, Congress intended to apply vote dilution principles to judgeships, the State of Georgia believes that the fact that the matter was never brought to Congress' attention is strong evidence that weighs against a finding that

the new vote dilution principles should apply to this area. Of equal importance, amicus believes that there are such fundamental differences, as a matter of practicality and as a matter of fact, between traditional representative bodies and judicial elections that it is not reasonable to assume that Congress would have applied vote dilution principles to judgeships if Congress had actually considered the question.

While Congress was presented with testimony in 1981 and 1982 that the underrepresentation of minorities on local elected bodies was directly caused by election systems that exclude minorities *because of their race*, the exact opposite is the case in judicial elections around this nation. While it is true that minorities generally are not present on the state court bench – or on the federal bench for that matter – in proportion to their numbers in the general population, the reason for that is not electoral discrimination. Rather, the reason is the relatively lower percentage of minorities who are licensed to practice law and who, as such, are legally qualified to serve as judges. In the State of Georgia, for example, minority candidates have been very successful in seeking election and nomination to judgeships insofar as they have tried to do so. Indeed, the percentage of blacks on the bench actually exceeds their percentage within the Bar. Although it is true that the percentage of blacks on the bench is less than their overall percentage in the population at large, the sole reason for that disparity is their relatively lower numbers in the Bar.

Since the "underrepresentation" of minority judges that the plaintiffs complain about is not the product of the kind of electoral discrimination that was the basis of Congress' action in adopting the vote dilution statute in

1982, one cannot reasonably assume that Congress would have concluded that it was necessary to impose vote dilution principles on state judiciaries. Doing so would have been a radical intrusion into traditionally state prerogatives.

In addition, as a matter of both theory and practice, vote dilution remedies are inherently contradictory to the functions of the judiciary. The function of a judge is not to "represent" persons by bringing constituents' views to the bench. To the contrary, judges are supposed to apply the law neutrally to the evidence brought before them. While subdistricting remedies allow the voice of minority communities to be manifested more aggressively in the collegial decision making of representative bodies, subdistricting would provide no such benefits to minority voters electing trial court judges. Since trial court judges act individually and each is vested with the full authority of the court, the voters of a subdistrict who might appear in a case before a particular judge would be entirely disfranchised – rather than having some new kind of fuller and more equal "political access" – whenever they appeared before a judge who happened to have been elected from a subdistrict in which the parties did not reside.

Subdistricting judges would have a variety of other undesirable consequences, not the least of which would be the impairment of judicial independence. With judges being subject to frequent reapportionment, incumbent judges would be thrown into the political thicket of redistricting. Redistricting would be performed by state legislatures under the Constitutions of most States, including that of Georgia. Drawing the judiciary into the thicket of their own reapportionment would force state judges into

a level of subservience to state legislators and other political figures that would severely impugn the judiciary's present ability to remain impartial and to render decisions based on the facts and the law presented, rather than on the parties and politics involved.

Other vote dilution principles that might apply to other offices, such as attacks on majority voting or the separation of elections into separate posts for each elected official, are equally inappropriate and inapplicable to judgeships. The State of Georgia may be unique in having had extensive experience with both majority and plurality voting – before 1964 the political parties were allowed to chose their own rule in that regard – and the experience with plurality voting was uniformly negative. The use of separate designated seats for electing judges is particularly important to avoid having incumbent judges running against one another. Requiring incumbent judges to run against one another for open seats would create pressure for those judges to make their records, whether on criminal sentencing or other matters, more prominent and "attention-catching" than that of other judges. Again, the objective of judicial impartiality would be undercut.

ARGUMENT

I. VOTE DILUTION CHALLENGES TO STATE JUDICIAL ELECTIONS ARE SO DIFFERENT FROM TRADITIONAL VOTE DILUTION CASES INVOLVING LEGISLATIVE BODIES THAT ONE CANNOT REASONABLY CONCLUDE THAT CONGRESS INTENDED TO MAKE JUDGESHIPS SUBJECT TO THE 1982 AMENDMENT.

Based on an extensive review of the language of the Act and its legislative history, the Fifth Circuit's en banc

decision in these cases concluded that vote dilution claims cannot be brought against judges under the amended Section 2 of the Voting Rights Act. The State of Georgia as amicus curiae agrees entirely with the reasoning of the Court of Appeals and with the arguments made by appellees and other amici in support of affirmance of the Court of Appeals' rulings. See also, C. Cole, *The Voting Rights Act and the Election of Judges*, 14 AM. J. TRIAL ADVOCACY 1, 44-58 (1990). Georgia will not reiterate any of those arguments here, but wishes instead to point out some additional factors that support the conclusion reached by the Court of Appeals.

All parties to these cases agree with one point – applying vote dilution principles to state judgeships would significantly intrude into an area of public policy that traditionally has been the prerogative of the States. That being the case, Congress will not be found to have usurped the States' traditional authority unless the amended Section 2 clearly and expressly states that intent. Before Congress may be deemed to have altered the "usual constitutional balance between the State and Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Will v. Michigan Department of State Police*, 491 U.S. 58, ___, 109 S.Ct. 2304, 2308 (1989). "[I]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." 109 S.Ct. at 2308-09.

The reasoning of the Court of Appeals and the arguments advanced by appellees make it apparent that the

"clear statement" of congressional intent that would be required to impose vote dilution theories on state judiciaries is lacking. But there is another critical factor which also weighs heavily against finding that Section 2 vote dilution theories apply here. That fact, simply put, is that the circumstances surrounding state judicial elections are so different from those that pertain to traditional vote dilution challenges to legislative bodies, that it would be unreasonable to assume that Congress would have made vote dilution principles applicable to judgeships if Congress had faced the question. To the contrary, it is far more likely that, if Congress had made any inquiry into this topic, it would have concluded the exact opposite, that vote dilution principles were both inappropriate and unnecessary in the area of judicial elections.

In enacting the vote dilution provision of the amended Section 2, Congress was concerned with the ability of minority groups to have an opportunity to elect representatives of their choice and to participate meaningfully in the political process. Testimony was given to Congress that at-large elections in some communities foreclosed minorities from having a meaningful role in the political process, and that minority candidates could not be elected because of their race.

The situation is entirely different, as a matter of fact, with the judiciary. To the extent that there is a disparity between the number of minority judges and the percentage of minorities in the general population, that difference arises because the percentage of persons qualified to serve as judges who are minority is much less than the minority percentage in the general population.

In the State of Georgia, for example, the Georgia Constitution requires that superior court judges be members of the Bar for seven years or more. Ga. Const., Art. VI, Sec. VII, Par. II(a). This requirement is typical of what is found in other States. No one has previously alleged that that requirement is somehow arbitrary, racially discriminatory, or illegal, yet it is that requirement alone – and not circuit-wide elections or majority vote requirements – that has determined the relative number of black and white superior court judges sitting at present.

In the State of Georgia, six of 135 incumbent superior court judges are black, or 4.4 percent. This number *exceeds* the percentage of black lawyers in the State of Georgia, which is three percent, and it substantially exceeds the percentage of lawyers who are black *and* who satisfy the minimum seven-year practice requirement.

Furthermore, black candidates who have run for judgeships in Georgia have been very successful. Starting with the most comprehensive elections, there have been three instances where black candidates have run for statewide appellate courts, one for a seat on the Georgia Supreme Court and two for seats on the Georgia Court of Appeals. *The black candidates defeated white opponents in each of these three state-wide elections.* There have been ten other judicial elections since 1970 in which black and white candidates have opposed one another for the State's major trial courts, and a black candidate won seven of those ten races.[1] In 15 additional elections, black

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[1] In another of those ten races, the black candidate was unsuccessful, but neither did he carry a majority of the black voters.

candidates for these trial court judgeships have been elected without opposition.

The majority of all present incumbent superior court judges in Georgia were initially appointed to their positions. These appointments arose either through an initial appointment to a newly created seat or through the appointment of a new judge to an existing position that became vacant in mid-term. Appointments to superior court vacancies have been made by the Governor upon the recommendation of the Judicial Nominating Commission. As a matter of fact, black lawyers who have sought such appointments to superior court positions have enjoyed a success rate substantially higher than that of white applicants.

While the specific facts concerning the election and appointment history of minorities in the other 49 states naturally vary, the pattern exhibited in the State of Georgia is not uncommon in other States. Most significantly, the key question concerning minority "underrepresentation" on the bench in all States is the same. The issue does not relate principally to electoral problems, but to the fact that minority members of the Bar who are available to serve as judges are significantly fewer than the percentages of minorities in the general population.

This key issue that dominates the question of minority representation among judges is closely akin to the "qualified pool" type of issue that is part of this Court's decisions in employment discrimination and other areas. See, e.g., *Ward Cove Packing, Inc. v. Antonio*, 490 U.S. 642 (1989). It is an issue that has nothing whatsoever to do

with the vote dilution questions that were faced by Congress when it enacted the amended Section 2 of the Voting Rights Act in 1982.

The "qualified pools" of candidates for typical representative offices (legislatures, city councils, etc.) in the United States consist of all of those who have the legal qualifications to hold those offices, which generally are citizenship, residency, and some age requirement. Since the qualified pools of minority candidates for those offices, percentage-wise, are essentially the same as the percentage of minorities in the general population, Congress never had to consider this question in enacting the vote dilution principle in 1982. Neither did a single witness before Congress ever address this question in 1981 or 1982.

Had Congress addressed these questions, and had Congress considered the evidence and issues as they relate to the judiciary, it is not reasonable to assume that Congress would have concluded that the same federal legislative relief was necessary for the judiciary as for legislative offices. The basic facts and circumstances are simply too different.

II. VOTE DILUTION REMEDIES ARE INHERENTLY INAPPROPRIATE AND DEVOID OF RATIONAL JUSTIFICATION FOR STATE TRIAL JUDGES.

The remedial theory conceived of in the vote dilution decisions of this Court and the lower federal courts, is the replacement of multi-member districts and at-large elections with single member districts. See, e.g., *Thornburg v.*

Gingles, 478 U.S. 30 (1986). The purpose of that remedy is to allow minority voters who are concentrated in a particular area to elect representatives of their choice. Those minority-chosen officials then carry the views of their constituencies to the public body to which they have been elected, they advocate those views during the collegial decision making of those bodies, and the ultimate public policy decisions of those bodies presumably reflect the input of the minority-chosen candidates. Minority voters benefit from this remedy in that all of the actions of the body are presumably more reflective of and responsive to the concerns and views of the minority community.

The logic of this remedy, however, is wholly inapplicable in the case of trial court judges. State trial court judges do not act collegially as do persons elected to representative bodies, such as state legislatures, city councils, school boards, and other policy setting bodies with general legislative authority. Instead, the entire power and authority of the trial court is vested in each and every trial judge, and when judges preside over cases, they exercise all of that authority without any limitations imposed by any of the other persons who were elected as judges of that court.

As a practical matter, therefore, a minority voter would derive none of the benefits from a subdistricted trial court that he or she would derive from a subdistricted city council or other representative body. Where a minority constituent is a party before a court, the chances are that they would more likely appear, if the court were subdistricted, before a judge that that constituent had no opportunity at all to vote on. Thus, as a practical matter, if subdistricting remedies were applied

to the judiciary, minority voters would not in any way achieve some new or enhanced "equal opportunity to participate in the political process," 42 U.S.C. §1973. More often than not, the voters would instead be entirely disfranchised in connection with those actions of the local courts that might directly and personally impact on them.

This situation is entirely different from traditional cases involving representative government where minority citizens' votes are manifested in the electoral body through their elected representative. Those representatives, in turn, cast their votes on *every single* action of the legislative body. Those bodies cannot act in any other way, except through that collegial process that involves the equal actions of each of the elected representatives. That cannot occur with elected trial court judges because the functions of a court and representative bodies are so different, and judges act without any of the collegial constraints that characterize representative bodies.

III. VOTE DILUTION REMEDIES ARE PARTICULARLY INAPPROPRIATE FOR STATE COURT JUDGES BECAUSE THEY WOULD SEVERELY UNDERCUT THE INDEPENDENCE OF THE JUDICIARY AND THE SEPARATION OF POWERS PRINCIPLES THAT ARE FOUND IN THE CONSTITUTIONS OF ALL 50 STATES.

Separation of the powers of the three branches of government is fundamental to the American concept of government, both on the federal and state level. Each of the 50 state Constitutions incorporates notions of this sort, just as does the federal Constitution. See *Marbury v. Madison*, 5 U.S. 137 (1803). As a practical matter, however,

vote dilution remedies would severely undercut the independence of state judiciaries and, in turn, undermine the principle of separation of powers.

If vote dilution notions were imposed on state judiciaries and traditional subdistricting remedies arose, the political independence now enjoyed by state judiciaries would be destroyed. With judges elected from electoral subdistricts, reapportionment would be required for those subdistricts on a continuous basis. Not only would reapportionment be required with each decennial census, reapportionment would also be required on those intervening occasions when new judges were added to a court on account of increased caseloads. The court's subdistricts would have to be adjusted to reflect each new judgeship. In the metropolitan areas, for example, where judgeships are typically added each year or so, reapportionment would literally be an annual affair.[2]

As a practical matter, reapportionment of judicial subdistricts would be the function of the state legislature

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[2] While the Fourteenth Amendment does not appear to require equalization of the number of judges from circuit to circuit based on population, because the number of judges has historically been based on caseload, *New York Trial Lawyers v. Rockefeller*, 267 F.Supp. 148 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F.Supp 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966), that situation is entirely different from what would pertain with subdistrict remedies for vote dilution. With electoral subdistricts for a single court, judgeships on that court would no longer be apportioned on the basis of caseload, but rather on the basis of the population of voters within the court's circuit. If Section 2 were so construed to make judges "representatives," it would appear that one person/one vote principles would apply. Hence, decennial and more frequent apportionment would be required.

under the Constitutions of most States, and that would be the case in Georgia. With incumbent judges' districts subject to constant redrawing and political intermeddling by legislators, the independence of the judiciary would inevitably suffer. Our ideal in this country is for judges to make decisions based on their good faith perception of the law and the facts, not on the basis of the political implications and repercussions of their decisions, and not on the basis of how any one or more well-placed individuals might react to their decisions. But it is not realistic to think that a judge could wholly ignore the grave implications of his or her own reapportionment in cases where local legislators might have some interest in the outcome of a case. Since an incumbent judge's continuation in office and very livelihood would be controlled by how districts were drawn and redrawn, the threat to a judge of a punitive reapportionment would be very real. Only a rare person could completely ignore that threat.

Moreover, the interference caused by the political thicket of reapportionment would unfortunately arise frequently in a judge's normal caseload. Members of the legislature would have an interest in a wide variety of cases that routinely come before a State's trial courts. All issues dealing with the State, for example, including the constitutionality of State laws, actions to review administrative decisions, prominent criminal cases and capital cases, and a virtually endless variety of other publicly important cases would potentially demand the attention of one or more legislators. Legislators who might have a personal interest in a case, either as a party, an attorney representing a party, or simply the friend of a party or witness, would create another class of cases where a

judge's independence could be impugned, however subtly, by the fear of irritating a legislator who had reapportionment power over that judge.

These grave problems do not exist with the single-member district remedies imposed in vote dilution cases involving representative bodies. To the contrary, the political give and take of reapportionment is an accepted and proper part of the overall political process involving those bodies. But it would be antithetical to our concept of an independent, fair-minded judiciary acting impartially based on the law and the facts before the court.

IV. POSSIBLE VOTE DILUTION REMEDIES OTHER THAN SUBDISTRICTING ARE EQUALLY INAPPLICABLE AND INAPPROPRIATE IN THE CASE OF JUDGES.

While the State of Georgia understands that the issues before this court are the strict application of Section 2 to judges, and the impropriety of applying subdistricting remedies to judges, amicus would also point out that other remedies that have been considered in voting cases are equally inappropriate. One such remedy, the replacement of majority vote requirements with plurality requirements, has been sought in several recent cases by private litigants and by the Department of Justice. See, e.g., *Brooks, et al. v. Harris, et al.*, Case No. 1:90-CV1001-RCF (N.D. Ga., filed May 8, 1990); *United States of America v. State of Georgia, et al.*, Case No. 1:90-CV-1749-RCF (N.D. Ga., filed August 9, 1990). As a practical matter, however, majority vote requirements, while having little if any adverse impact on minority voters, serve compelling public interests.

It may be that the State of Georgia has unique experience in that regard because, prior to the adoption of a new and comprehensive Election Code in 1964, political parties had the option of using plurality voting or majority voting in their primary elections. Both practices were thus present in various counties throughout the State over the years prior to 1964, at the option of the local political party executive committees. As a practical matter, when the State of Georgia determined that a comprehensive Election Code should be adopted and that this authority should be taken away from the political parties, the evidence was overwhelming that plurality voting had been nothing short of disastrous from the public's point of view. Plurality voting frequently led to the perpetuation in office of unfit or outright corrupt public officials who, although opposed by a majority of the citizenry, could not be removed from office because of the plurality vote principle. Because of the ability of an incumbent, even a corrupt one, to garner a significant number of votes – whether 25 or 35 percent – incumbents proved unbeatable. They simply saw that enough other candidates qualified from different areas around the jurisdiction to successfully split opposition votes. It was not at all unusual in those cases for the incumbents and their associates to pay the qualifying fees for these other candidates. Time after time, public spirited citizens failed in their efforts to remove such people from office, even though the total votes cast by opposition forces constituted a majority of the total votes cast.

The sole argument ever advanced in favor of plurality voting when the issue was debated in 1963 and

1964 in connection with the adoption of the State's comprehensive new Election Code, was that plurality voting was cheaper. A second, runoff election, when required, naturally caused some additional expense. That argument paled by comparison to the public interest in ensuring that the will of the majority was followed and that, in particular, undesirable officials could not be perpetuated in office by plurality voting.

Those courts that have considered challenges to majority voting to date have evidenced clear hostility to the plaintiffs' claims, and for good reason. See, e.g., *Butts v. City of New York*, 779 F.2d 141 (2nd Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Whitfield v. Democratic Party of Arkansas*, 686 F.Supp. 1365 (E.D. Ark. 1988), aff'd by an equally divided court, 902 F.2d 15 (8th Cir. 1990) (en banc), cert. denied, 111 S.Ct. 1089 (1991). The efforts of various segments of the civil rights community to advance plurality voting under the guise of vote dilution principles is seriously misplaced and is very much contrary to the interests of the public at large, both majority and minority.

The use of separate designated seats (often called "numbered posts") to elect judgeships in Georgia is another practice that has been attacked, on occasion, under the guise of vote dilution principles. This practice is, as a practical matter, necessary to effectuate majority vote principles. In addition, it serves important and salutary purposes in connection with the election of judges.

The use of separate posts for electing each judge of a court ensures that that judge is not put in direct competition before the voters with other members of the court. If

posts were eliminated and judges were thrown into direct competition with one another, that would create highly inappropriate pressure on sitting judges to render rulings that would maximize their public exposure. Judges might feel pressure to impose as great as possible a sentence in criminal cases, for example, so that their sentencing record might not be unfavorably compared to other incumbent judges against whom they would be running.

The maintenance of impartial and independent judges, unaffected by immediate political concerns, is an important consideration that supports using separate designated posts for election of judgeships. Vote dilution principles contained in the new Section 2 of the Voting Rights Act should not be interpreted to undermine these practices.

CONCLUSION

For the foregoing reasons, the reasons advanced by respondents and other amici in their support, and for the reasons stated by the Fifth Circuit Court of Appeals, the State of Georgia respectfully requests that this Court affirm the decisions below.

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE FLORIDA CONFERENCE OF CIRCUIT JUDGES, CONFERENCE OF COUNTY JUDGES OF FLORIDA, AND THE FLORIDA BAR IN SUPPORT OF RESPONDENTS

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Nos. 90-813 and 90-974

In The

Supreme Court of the United States

October Term, 1990

HOUSTON LAWYERS ASSOCIATION, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE FLORIDA CONFERENCE OF CIRCUIT JUDGES, CONFERENCE OF COUNTY JUDGES OF FLORIDA, AND THE FLORIDA BAR IN SUPPORT OF RESPONDENTS

The Florida Conference of Circuit Judges, the Conference of County Judges of Florida, and The Florida Bar, by

undersigned counsel, move the Court for leave to file a brief of *amici curiae* in support of Respondents and as grounds therefor would show:

1. The Florida Conference of Circuit Judges is an association of all active and retired circuit judges of Florida which is responsible for making recommendations to the state supreme court to improve the state judicial system.

2. The Conference of County Judges of Florida was created for the purpose of the improvement of the state judicial system.

3. The Florida Bar is an official arm of the Supreme Court of Florida. The Bar consists of all attorneys licensed to practice law in the state. One of the purposes of the Bar is the improvement of the administration of justice.

4. The Conferences and the Bar support the position of Respondents that section 2 of the Voting Rights Act does not apply to elections of trial judges.

5. The Conferences and the Bar request leave to file a brief of *amici curiae* to bring to this Court's attention the detrimental impact which would result in the State of Florida if section 2 of the Voting Rights Act is interpreted to require single-member districts in elections of trial judges, and do not believe that such impact will be presented to the Court by any of the parties currently permitted to file briefs in this action.

6. The Conferences and the Bar have made a good faith effort to obtain the permission of the parties to file a brief, but such permission has been denied by League of United Latin American Citizens. Permission has been

granted by Houston Lawyers' Association, Jesse Oliver, Judge F. Harold Entz, Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon Macrae, and Michael P. Peden, Bexar County Texas State District Judges, Judge Sharolyn Wood, and the Attorney General of Texas as per accompanying letters.

WHEREFORE, The Florida Conference of Circuit Judges, The Conference of County Judges of Florida, and The Florida Bar respectfully request leave to file a brief of *amici curiae* in support of Respondents.

Respectfully submitted,

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BRIEF OF AMICI CURIAE FLORIDA CONFERENCE OF CIRCUIT JUDGES, CONFERENCE OF COUNTY COURT JUDGES OF FLORIDA, AND THE FLORIDA BAR IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

The Florida Conference of Circuit Judges is an entity created by Florida law. Fla. Stat. § 26.55. Its members are all 421 active and all retired circuit judges of the state. *Id.* § 26.55(1). The Conference is responsible for making recommendations to the state supreme court to improve the state judicial system. *Id.* § 26.55(3). The Conference of County Judges of Florida was created by rule of the Supreme Court of Florida with the stated purpose of the "betterment of the judicial system of the State." Fla. R. Jud. Admin. 2.120. Its members are the 242 county judges of Florida. Together the Conferences of Circuit and County Judges constitute the trial judges of Florida. The Florida Bar is an official arm of the Supreme Court of Florida charged with the discipline of all attorneys licensed to practice law in the State of Florida. Fla. Const. art. V, § 15; Rules Regulating The Florida Bar – General Introduction. Among the Bar's chartered purposes is the improvement of the administration of justice. Rules Regulating The Florida Bar 1-2. The issue raised in this case directly impacts upon the quality of legal services that may be accorded the people of Florida and is considered an especially appropriate matter for commentary from The Florida Bar. The Conferences and The Florida Bar have a vital interest in preventing the inevitable harm to the Florida judicial system if 42 U.S.C. § 1973 is interpreted to require subdistricting in the elections of trial judges.

SUMMARY OF THE ARGUMENT

In response to this Court's holding in *Mobile v. Bolden*, 446 U.S. 55 (1980), Congress amended section 2 of the Voting Rights Act to provide that a violation may be shown by proving a discriminatory effect alone. Congress did not intend that section 2 of the Voting Rights Act as amended apply to trial court judges. The plain meaning of the amendment to the statute controls, thereby obviating the need for resort to the legislative history.

The specified statute provides that a violation is shown if, based on the totality of the circumstances, it is shown that a protected class of citizens has less opportunity than other electors "to participate in the political process" and "to elect *representatives* of their choice." 42 U.S.C. § 1973(b) (emphasis added). At the time of the amendment numerous federal courts had stated that judges are not representatives. Congress is presumed to know of the judicial construction of existing law. Therefore, it must be presumed that Congress was aware when it chose the word "representative" rather than another, broader term, that it was specifying that judges were not to be within the scope of that section of the Act. As will be shown by a review of the relevant case law and specific reference to provisions governing judges in Florida, judges are not "representatives" and are, therefore, not included within the ambit of the Act.

Even if the Act is construed to include judges within its reach, vote dilution claims do not apply to trial judges because such judges hold single-member offices. Since the office of a judge is indivisible, capable of being held by only one person, the electorate cannot be divided into

subdistricts. Therefore, the en banc decision of the Fifth Circuit Court of Appeals should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF 42 U.S.C. § 1973 EXCLUDES JUDGES

The issue before this Court is whether section 2 of the Voting Rights Act applies to elections of trial judges. For reasons which follow, *amici curiae* respectfully request this Court to affirm the en banc decision of the court below that section 2 does not apply to trial judges.

The Voting Rights Act "is directed at procedures that deny racial minorities a fair opportunity to participate in the electoral process, and not at those that may have the result of reducing the likelihood that a minority will elect its preferred candidate to a single-member office." *Butts v. City of New York*, 779 F.2d 141, 151 (2d Cir. 1985). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). This Court and numerous commentators agree that multi-member districts and at-large voting schemes may prevent minorities from electing the representatives of their choice. *Id.* at 47-48. However, "multimember districts are not per se unconstitutional." *White v. Regester*, 412 U.S. 755, 765 (1973). In the case of judges, multimember districts are not unconstitutional because judges are not "representatives" and because judges hold single-

member offices. The majority in the lower court accepted the former contention and, therefore, did not reach the latter, which was relied on by the concurrence.

The Voting Rights Act, prior to the 1982 amendments, read as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1975). This Court held that to prove a violation of the Act, minority voters must prove that the challenged voting practice was adopted intentionally for a discriminatory purpose. *Mobile v. Bolden*, 446 U.S. 55 (1980). In response, Congress amended the statute in 1982 to "make clear that a violation could be proved by showing discriminatory effect alone." *Thornburg*, 478 U.S. at 35. The statute as amended reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of

> citizens protected by subsection (a) of this section in *that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice*. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis added). The italicized language of subsection (b) is substantially identical, with one glaring exception, to the following italicized language in Justice White's opinion in *White v. Regester*, 412 U.S. at 766:

> The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question – *that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.*

Id. (emphasis added). A comparison of the italicized portions of the statute and the opinion reveals that the only significant change is that instead of saying "to elect *legislators* of their choice," Congress said, "to elect *representatives* of their choice." It is hard to believe that Congress carelessly chose a word to replace "legislators." The fact that Congress chose the word "representatives" instead of some broader term such as "candidates" or "public officials" leads to the inescapable conclusion that Congress did not intend to include judges within the mandate

of the statute. The well-established judicial construction of the term "representatives," at the time of the amendment, did not include judges. *See, e.g., Sagan v. Commonwealth of Pennsylvania*, 542 F.Supp. 880 (W.D. Pa. 1982); *Concerned Citizens v. Pine Creek Conservancy District*, 473 F.Supp. 334 (S.D. Ohio 1977; *Buchanan v. Gilligan*, 349 F.Supp. 569 (N.D. Ohio 1972); *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973); *Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971), *aff'd mem.*, 409 U.S. 807 (1972). Congress is generally presumed to be "knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988). Therefore, presumably Congress knew when using the word "representatives," it would not include judges within the reach of the statute. One cannot assume that Congress made such a choice lightly. Thus, the majority in the court below found it "all but impossible to avoid the conclusion that Congress intended to apply its newly imposed results test to election for representative, political offices but not to vote dilution claims in judicial contests. . . . " *LULAC v. Clements*, 914 F.2d 620, 628 (5th Cir. 1990) (en banc).

The lower court herein concluded that "to suggest that Congress chose 'representative' with the intent of including judges is roughly on a par with suggesting that the term *night* may, in a given circumstance, properly be read to include *day*." *Id.* at 629. Given the clarity of the statute, the majority stated, "In the words of Justice Frankfurter, writing for a unanimous court in *Greenwood v. United States*, it appears to us that 'this is a case for applying the canon of construction of the wag who said,

when the legislative history is doubtful, go to the statute.' 350 U.S. 366, 374 (1955)." *Id.* at 630.

The unremarkable notion that judges are not representatives accords with traditional notions of the role of judges in American government. This is reflected in the cases decided before the 1982 amendment which conclude that judges are not representatives. In holding that the one-man, one-vote rule does not apply to judges, a Louisiana district court, in a decision affirmed by this Court, cited the purpose of the rule as being "to make sure that each official member of an elected body speaks for approximately the same number of constituents." *Wells v. Edwards*, 347 F.Supp. at 455; *see also Concerned Citizens v. Pine Creek Conservancy District*, 473 F. Supp. 334, 337 (S.D. Ohio 1977) (quoting *Wells*). The court concluded that since judges do not speak for constituents, the one-man, one-vote rule does not apply to the judiciary. *Wells*, 347 F.Supp. at 455. "The state judiciary is not responsible for achieving representative government." *Buchanan v. Gilligan*, 349 F.Supp. 569 (N.D. Ohio 1972). "Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." *Stokes v. Fortson*, 234 F.Supp. 575, 577 (N.D. Ga. 1964); *see also Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (quoting *Stokes*).

An examination of Florida provisions governing judges illustrates that judges are not intended to be "representatives." The Code of Judicial Conduct governing Florida judges recognizes the appropriate role of judges. The Code, based on the American Bar Association Code

of Judicial Conduct, adopted by the Supreme Court of Florida in 1973, is replete with admonitions against partiality on the part of judges. *In re The Florida Bar – Code of Judicial Conduct*, 281 So. 2d 21 (Fla. 1973). Canon 1 provides:

> An *independent* and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and *independence* of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Id. at 23 (emphasis added). Canon 3 sets forth more explicitly the requirement that judges *not* be responsive to constituents: "A judge should be faithful to the law and maintain professional competence in it. *He should be unswayed by partisan interests, public clamor, or fear of criticism.*" *Id.* at 24 (emphasis added). Thus, partisan politics must play no role in the decision making process of a judge. This ideal prompted the lower court herein to note: "To describe the judge's office merely as 'not a representative one' is a gross understatement; in truth, it is rather the precise antithesis of such an office. Just insofar as a judge *does* represent anyone, he is not a judge but a partisan." *LULAC*, 914 F.2d at 628. Additionally, the permissible campaign conduct of judicial candidates is circumscribed by the Code:

> A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

* * *

> should not make pledges or promises of conduct in office other than the faithful and *impartial* performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

281 So. 2d at 32 (emphasis added). Thus, a judicial candidate may not properly campaign based on a promise to represent any particular constituency or viewpoint. A judge makes only one campaign promise and that is that he will remain impartial at all times. Therefore, he cannot possibly be said to "represent" *any* group of people, minority or otherwise. No group is entitled to be "represented" by a judge; therefore, no group has the right to elect a judge of its choice.

In Florida, supreme court justices and district court of appeal judges are appointed. Circuit and county judges are currently elected, pursuant to the Florida Constitution. Circuit judges have been elected since 1942. County judges were elected as early as 1885. Even though some Florida judges are elected, Florida has taken steps to reduce the political aspects of judicial elections. Florida law provides that such elections must be nonpartisan. Fla. Stat. § 105.011(2). Reference to political party affiliation is prohibited on the ballot for judicial office. Fla. Stat. § 105.043(3). Candidates for judicial office may not:

(1) Participate in any partisan political party activities, except that such candidate may register to vote as a member of any political party and may vote ~~in~~ any party primary for candidates for nomination of the party in which he is registered to vote.

(2) Campaign as a member of any political party.

(3) Publicly represent or advertise himself as a member of any political party.

(4) Endorse any candidate.

(5) Make political speeches other than in his own behalf.

(6) Make contributions to political party funds.

(7) Accept contributions from any political party.

(8) Solicit contributions for any political party.

(9) Accept or retain a place on any political party committee.

(10) Make any contribution to any person, group, or organization for its endorsement to judicial office.

(11) Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization.

Fla. Stat. § 105.071. Violation of the statute is a first degree misdemeanor. *Id*. It is also a second degree misdemeanor for any political party or partisan political organization to "endorse support, or assist any candidate in a campaign for election to judicial office." Fla. Stat. § 105.09. A federal district court has held Fla. Stat.

§ 105.09 unconstitutional. *Concerned Democrats v. Reno*, 458 F.Supp. 60 (S.D. Fla. 1978), *rev'd on other grounds*, 601 F.2d 891 (5th Cir. 1979). Although the district court held that Florida had a compelling interest "in maintaining the non-partisan qualities of its [judicial] elections," the court held that the state had failed to use the least intrusive means to achieve that goal. The court's comments on the state's interest in nonpartisan judicial elections are enlightening. The Florida Attorney General's office had argued that "the State's interest was in maintaining the integrity and impartiality of the state judiciary." *Id*. at 64. The district court agreed, stating:

> There can be no question that the state has a vital interest in assuring that its judges are free from direct political pressure; that they can render decisions independent of political ramifications; and that they can discharge their duties free from the pressure, sometimes subtle and sometimes otherwise, that can be applied by political groups.

The court further noted the existence of "an obvious interest to both the public and the Legislature in having judicial candidates free of the appearance of impropriety," and concluded that the "appearance of partisanship will hardly foster public confidence in the courts." *Id*. at 65.

That Florida and other states have provided for election of some judicial officials does not signify that such elected officials must, therefore, be representatives. The interests of all groups participating in elections of judges are the same; the electorate seeks judges who will comply with traditional requirements of honesty, integrity, and impartiality. Judicial elections are not held to give any

group the opportunity to have its partisan views represented. Rather, judicial elections "assure the public that the judicial function will be kept accountable to the common sense of the electorate." *LULAC*, 914 F.2d at 632, (Clark, C.J., concurring specially). In judicial elections, "[i]t is expected that candidates who lack training or a reputation for honesty or sound intellect will not be elected. In like manner, those who are indolent, will not decide cases, or decide erratically will not be re-elected." *Id.* Thus, the needs of all voters are identical. The goal of judicial elections is the attainment of a qualified and impartial judiciary. Requiring subdistricting in judicial elections does nothing to further that goal; in fact, subdistricting has exactly the opposite effect and creates judges who are partisans, chosen not for their qualifications or integrity, but for their willingness, as perceived by the electorate, to represent a particular point of view or a particular geographical region.

In addition, the Florida judicial elections have been made less political by the creation of judicial nominating commissions and judicial qualifications commissions.

The judicial qualifications commission is:

> vested with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct . . . demonstrates a present unfitness to hold office, and to investigate and recommend the reprimand of a justice or judge whose conduct . . . warrants such a reprimand.

Fla. Const. art. V, § 12(a). The judicial qualifications commission is composed of six judges (two district court of appeal judges, two circuit judges, and two county

judges), two electors who are attorneys, and five electors who are not attorneys. The judges are chosen by their respective courts; the attorneys are chosen by the governing board of the Florida Bar and the lay people are appointed by the governor.[1] *Id.* All members of the commission who are not subject to impeachment may be suspended by the governor and removed by the senate. Fla. Const. art. V, § 12(c), art. IV, § 7.

The commission is empowered to adopt its own rules, which "may be repealed by general law enacted by a majority vote of the membership of each house of the legislature." Fla. Const. art. V, § 12(d). The commission's proceedings are confidential until the filing of formal charges with the clerk of the supreme court. *Id.* Once a formal charge is filed all proceedings are public. *Id.* With seven members concurring, the commission may "recommend to the supreme court the temporary suspension of any justice or judge against whom formal charges are pending." *Id.* Such suspension may be with or without compensation. *Id.* § 12(f). The supreme court may, upon recommendation of two-thirds of the commission members, reprimand, remove, or involuntarily retire a justice

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[1] The constitution further provides that the members of the commission serve staggered terms not to exceed 6 years and that no member of the commission except a justice or judge is eligible for state judicial office while a member of the commission and for 2 years thereafter. Nor may members of the commission "hold office in a political party or participate in any campaign for judicial office or hold public office." Fla. Const. art. V, § 12(b). As an exception to the last rule, "a judge may participate in his own campaign for judicial office and hold that office." *Id.* The commission elects one of its members as chairman. *Id.*

or judge. Fla. Const. art. V, § 12(f). The constitution provides that "Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness for office." *Id.*

Another effort to reduce the political aspects of Florida judicial elections has been the creation of the judicial nominating commissions which are responsible for nominating candidates to fill vacancies on the supreme court, district courts of appeal, circuit courts and county courts. Fla. Const. art. V., § 11. A separate judicial nominating commission exists "for the supreme court, each district court of appeal, and each judicial circuit for all trial courts within the circuit." Fla. Const. art. V, § 11(d). The judicial nominating commission at each level of the court system is responsible for establishing its rules, which "may be repealed by general law enacted by a majority vote of the membership of each house of the legislature, or by the supreme court, five justices concurring." *Id.* The commission's proceedings, except for deliberations, are public. *Id.*

The historical development of the judiciary in Florida has "been accompanied by a steady diminution in political influence of the general population and the elective legislative and executive branches of government in judicial matters and a steady rise in the influence of the judiciary. . . . " Little, *An Overview of the Historical Development of the Judicial Article of the Florida Constitution*, 19 Stetson L. Rev. 1, 40 (Fall 1989). Little concludes that "accountability of the judicial branch of state government has gradually been transferred away from the electorate

and its elected representatives to the supreme court and the Florida Bar." *Id.* at 41.

The state of Florida has a substantial interest in maintaining circuit-wide and county-wide election of judges. "The history of the judicial article [of the Florida Constitution] suggests that at least from immediate post-civil war times onward, the judiciary has frequently been strained to cope with demands for access to courts." Little, *supra*, at 37.[2] Multi-judge circuits have been authorized in Florida since 1933, which "increased the flexibility of the legislature to adjust the numbers of circuit judges as required by changed demands on the court." *Id.* at 22.

The Florida experience, therefore, reflects a trend, presumably not unique among the states, toward reducing political aspects of the judiciary. The creation of single-member districts in judicial elections would be anathema to the ideal of a nonpartisan, impartial, and independent judiciary.

II. VOTE DILUTION CLAIMS DO NOT APPLY TO JUDGES WHO HOLD SINGLE-MEMBER OFFICES

The use of at-large elections rather than single-member districts "may have the effect of denying areas with large concentrations of minority voters the opportunity to pool their strength and elect members of their class from

---

[2] The Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Fla. Const. art. I, § 21.

such areas." *Butts v. City of New York*, 779 F.2d at 148. Even if judges are included within the reach of section 2 of the Voting Rights Act, vote dilution claims do not apply to trial judges because such judges hold single-member offices. The remedy of subdistricting is, therefore, inappropriate. The purpose of subdistricting is to ensure that the minority vote is not diluted; that is that minorities have a voice in the decision making process because they are able to elect a representative of their choice to speak for their views to an elected body. However, as noted by the Second Circuit Court of Appeals:

> There can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

Id. Thirty-seven of Florida's sixty-seven counties have only one county judge. Fla. Stat. § 34.022. The fact that in some counties and circuits several individuals hold office with the same title, "circuit judge" or "county judge," does not convert that office into a multimember office. Trial judges do not act together. Each judge has sole responsibility for the cases on his docket. Even in cases in which another judge is brought in to hear a portion of a case, for example pretrial motions, each judge makes the decisions on his portion of the case independently. Florida, like Texas, "has structured its government such that it wields judicial power at the trial level through trial judges acting separately, with a coterminous or linked electoral and jurisdictional base, each exercising the sum

of judicial power at that level." *LULAC*, 914 F.2d at 646 (Higginbotham, J., concurring).

The concurring opinion of Judge Higginbotham contained the argument that if judicial districts are divided into subdistricts minority litigants stand little chance of appearing before a judge who is responsive to their special concerns. *Id.* at 650. The dissent vehemently rejected the suggestion, implicit in the concurrence, that judges must be accountable to potential litigants. *Id.* at 667. However, subdistricting would not only diminish a minority voter's likelihood of appearing as a litigant before a judge in whose election the voter had some influence, subdistricting would greatly diminish the minority voter's influence over the judges who decide all cases. Minority voters will have influence over only a minute percentage of all cases decided. The vast majority of all cases will be decided by judges over whom a minority subdistrict voter holds absolutely no sway. This situation differs greatly from that of a true multimember office, such as a legislature, in which the candidate representing a minority has a voice in *all* decisions. Subdistricting in the elections of true multimember bodies ensures that the minority viewpoint will be represented in all decision making. Subdistricting in judicial elections, however, would operate to deprive the minority of a voice in most decisions because of the independence of each judge. As stated by one Eleventh Circuit Judge apparently opposed to subdistricting in all elections, subdistricting "serves those who would be candidates well, but it disserves the voters, who lose the opportunity to have a political impact upon and obtain political responsiveness from *all* candidates and elected officeholders."

United States v. Dallas County Commission, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring specially). Therefore, subdistricting in judicial elections is inappropriate and is not required by 42 U.S.C. § 1973.

CONCLUSION

Based on the foregoing, this Court should affirm the en banc decision of the Fifth Circuit Court of Appeals that section 2 of the Voting Rights Act does not apply to the election of trial judges.

Respectfully submitted,

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FOR ARGUMENT

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No. 90-813 and No. 90-974

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In The

Supreme Court of the United States

October Term, 1990

HOUSTON LAWYERS' ASSN., et al.,

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, et al.,

Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,

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v.

ATTORNEY GENERAL OF TEXAS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, apply to dilution claims in the election of state court trial judges in multi-judge districts?

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AMICUS BRIEF OF THE STATES OF TENNESSEE, ALABAMA, ARKANSAS, FLORIDA, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA AND WASHINGTON IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI STATES

The amici states have a definite and substantial interest in the outcome of this case. According to a 1988 survey of the National Center for State Courts, there are thirty-nine states[1] in which state court judges are elected at either the appellate or general trial jurisdiction court level of both. Knoebel, *The Voting Rights Act: Are Its Provisions Applicable to the Judiciary?*, 13 State Court Journal 24 (1989). Application of Section 2 of the Voting Rights Act of state judicial elections involving multi-judge districts at the trial and appellate levels could affect the selection process for such offices in each of the amici states.

A summary of the number of affected states and judges at each court level is as follows:

COURT LEVEL	NUMBER OF STATES	NUMBER OF JUDGES
Courts of Last Resort		
Statewide	28	191
Multi-Judge Districts	4	20

[1] The thirty-nine states are as follows: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

COURT LEVEL	NUMBER OF STATES	NUMBER OF JUDGES
Intermediate Appellate Court		
Statewide	14	134
Multi-Judge Districts	10	320
General Trial Court		
Statewide	1	72
Multi-Judge Districts	37	5638

Id. at 27.[2] According to the National Center for State Courts, the percentages of state court judge, who could be affected in each of the these categories, are as follows: courts of last resort – 62%; intermediate appellate courts – 59%; and general trial courts – 72%. *Id.* at 28.

Each of the amici states falls into one or more of the above mentioned categories. The impact of Section 2 of the Voting Rights Act upon the method by which the citizens of the amici states select their state judiciary is an important issue pertaining to the relationship between the federal government and the states. Congressional incursion into the affairs of a state so basic as the structure of a state's judiciary should be cautiously considered and permitted by the federal judiciary only when there is a "clear and unequivocal expression" by Congress to do so. The amici states are in a unique position to aid this Court in making a determination as to whether there is a "clear statement" of Congressional intent to apply Section 2 of the Voting Rights Act to the election of state court judges.

[2] A complete list of the states and each category of the chart is set forth in the appendix to this brief.

STATEMENT OF THE CASE

The amici states adopt the statement of the facts as presented by the panel opinion in *League of United Latin American Citizens Council v. Clements*, 902 F.2d 293 (5th Cir. 1990) (*LULAC*) along with the statement of the facts as presented by the respondent.

ARGUMENT

I.

SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT CONTAIN A CLEAR AND UNEQUIVOCAL EXPRESSION TO APPLY TO THE ELECTION OF STATE COURT JUDGES.

The issue in this case is whether state court judges are "representatives" within the meaning of results test in Subsection (b) of Section 2 of the Voting Rights. Act. It is the position of amici states that state court judges are not "representatives". Therefore, a claim that the election of state court judges in multi-judge districts "results" in the dilution of minority voting strength cannot be brought under Section 2 of the Voting Rights Act.

There are a number of sources upon which to rely in determining the applicability of Section 2 to the election of state court judges. These sources include: (1) rules of statutory construction, (2) legislative history and debates of the Voting Rights Act, (3) executive construction of the Voting Rights Act, and (4) judicial construction of other sections of the Voting Rights Act. In their brief, the *LULAC* petitioners rely upon the latter three sources

while ignoring the first. Petitioners' Brief, p. 16 (legislative history), p. 18 (construction by the Attorney General), and p. 14 (judicial construction of Section 5).

There is a rule of statutory construction which has particular relevance to the applicability of Section 2 to the election of state court judges. This Court has held that if Congress intends to alter the "usual constitutional balance between states and the federal government", then it must make its intention to do so "unmistakably clear in the language of the statute."[3] *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-43 (1985). Many of the recent cases which apply this principle involve immunity of states from suit under the Eleventh Amendment. *Dellmuth v. Muth*, 109 S.Ct. 2397 (1989) (Education of the Handicapped Act held not to abrogate the Eleventh Amendment); *Hoffman v. Connecticut Department of Income Maintenance*, 109 S.Ct. 2818 (1989) (Section 106 of the Bankruptcy Code did not abrogate the Eleventh Amendment); *Pennsylvania v. Union Gas Company*, 109 S.Ct. 2273

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[3] The purpose of requiring Congress to make a "clear statement" of applicability to a traditional state function is best stated in the following commentary:

> By refusing to construe ambiguous legislation expansively, the Court can act to prevent Congress from avoiding hard questions of federal-state relations, and can thus increase the likelihood that Congress will give full attention to the interests of the states and of those groups whose interests parallel the states'.

Tribe, *American Constitutional Law* at 383 (1988).

(1989) (Comprehensive Environmental Response, Compensation and Liability Act of 1980 held to abrogate the Eleventh Amendment).

In addition, this rule of construction has been applied beyond the Eleventh Amendment context. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (preemption of historic police powers of the states must be "clear and manifest" by Congress); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981) (congressional intention to impose conditions on the grant of federal monies must be "expressly articulated"); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (where Congress conditions a state's receipt of federal funds, it must do so "unambiguously"). Most recently, this Court determined that neither a state nor a state official sued in his official capacity for money damages was a "person" within the meaning of 42 U.S.C. § 1983. *Will v. Michigan*, 109 S.Ct. 2304 (1989).[4]

The method by which each state's judiciary is selected is a fundamental part of a state's affairs. In many states, the method of selection of judges is set forth in the fundamental document organizing it, namely, the Constitution. *See generally, Constitutions of the United States: National and State* (June 1990) (Legislative Drafting

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[4] In the case of *Quern v. Jordan*, 440 U.S. 332 (1979), this Court held that Section 1983 did not abrogate the Eleventh Amendment. However, the Eleventh Amendment was not at issue in the *Will* case since the Section 1983 action was brought in state and not federal court. Nonetheless, this Court concluded that Congress did not provide a clear and unequivocal expression that states were intended to be persons within the meaning of 42 U.S.C. § 1983. *Will*, 109 S.Ct. at 2308.

Research Fund of Columbia University). Any congressional incursion into such an important state function must be clear and unequivocal. Otherwise, the delicate balance between state and federal relations will be unnecessarily tipped.

By applying this rule of statutory construction to Section 2 within the context of state court judge elections, a heavy burden is imposed upon the petitioners to show that Congress "clearly and unequivocally" intended Section 2 to apply to such elections. Thus, the issue is not just whether the Voting Rights Act might have been intended by Congress to apply to elections of state court judges, but whether Congress made a "clear and unequivocal expression" that Section 2 be applied to such elections.

The "results test" in Subsection (b) of Section 2 of the Voting Rights Act speaks in terms of a violation when "members [of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The normal and ordinary usage[5] of the term "representative" means members of a legislative body not a judge. The dictionary definition of the term representative is "one that represents another or others in a special capacity as one that represents a constituency as a member of a legislative or governing body." *Webster's Third International Dictionary*, 1926 (1986).

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[5] This Court has held on numerous occasions that in construing statutes, the ordinary and normal meaning of words is to be utilized. *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985); *Aaron v. Securities and Exchange Commission*, 446 U.S. 680 (1980).

The function of a judge is not to represent a constituency in making decisions, but rather it is to interpret the law. As far back as our founding, that understanding of the function of the judiciary was expressed as follows:

> Interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

Federalist Papers, No. 78 at 467 (1961). Likewise, this Court affirmed a holding that judges are not "representatives" within the context of the doctrine of "one person, one vote". *Wells v. Edwards*, 347 F.Supp. 453 (N.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973). *See also*, Cole, *The Voting Rights Act and the Election of Judges*, 14 Am. J. Trial Adv. 1 (Summer 1990).

It is also important to the amici states for this Court to consider Article IV, Section 4 of the Constitution, which provides that the United States "shall guarantee to every state in this union a republican form of government", in defining the parameters of the term "representative" within the context of Section 2. The amici states contend that the Guarantee Clause is intended to ensure that states are protected in the structuring of their governments as long as such governments are republican in form. A commentator best stated this argument as follows:

> [T]here is an express provision that might possibly be invoked in support of the proposition that the Constitution recognizes in the National Government a duty, running directly "to every state of this union" rather than to individuals, to

> respect the states most fundamental structural choices as to how its people are to participate in their governance: Article IV, Section 4 expressly provides that the "United States shall guarantee to every state in the union a republican form of government." . . .
>
> No doubt both Congress and the federal judiciary are empowered under the Civil War amendments to assure that a state's choices of governmental structure respect basic norms of equal protection. And no doubt many options exist, consistent with those basic norms, for implementing the ideals of representative democracy through the requirement of "republican form". But the authority to chose among those options – the authority to decide consistent with equal protection of the laws, how one people will represent themselves and participate in their own governance – seems the very essence of all self-government.

Tribe at 398.

A republican form of government requires that those individuals who enact laws must be the popularly elected representatives of the people. *See Duncan v. McCall*, 139 U.S. 449 (1891) (The distinguishing feature of a republican form of government is the right of the people to choose their own officers for governmental administration and pass their own laws by virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.) On the other hand, a republican form of government does not require the popular election of its judiciary. U.S. Const., art. II, § 2 (members of the judiciary appointed by the President with the consent of the Senate). Likewise, judges in the state courts in this country are selected by a

number of different methods including: partisan elections, nonpartisan elections, gubernatorial appointments and legislative appointments.[6]

There is no dispute that states may chose to have their judges appointed by the governor or legislature and remain a republican form of government. Such an action would render the petitioners' claim moot since judges would no longer be elected. How can a judge be considered a "representative" of the people when his or her election by the people is not even required under the Guarantee Clause of the Constitution? In light of this analysis it is difficult to believe that the language of Section 2 contains a "clear and unequivocal" expression by Congress that the results test in Subsection (b) of Section 2 should apply to state judge elections.

Another point to consider is that raised by the American Judicature Society in its amicus brief, namely: the applicability of Section 2 of the Voting Rights Act to retention elections based upon merit selection.[7] If one

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[6] Additionally, some states provide for a judicial merit selection panel to select a list of nominees from which a gubernatorial or legislative appointment is made subject to a retention election. Moreover, the following eleven states do not select their judiciary by popular election of any type: Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia. A complete list of the methods by which states select their appellate and trial judges is set forth in the appendix of this brief.

[7] The trend in recent years for the selection of state court judges is for a merit based selection process with a retention election. In fact, the following states elect one or more levels of

(Continued on following page)

follows the petitioners' argument to its logical conclusion, then retention elections for judges in multi-judge districts would be subject to Section 2 claims. Minority voters could potentially have a claim that their vote to retain or not retain judges in a particular district were diluted even though such judges were originally appointed under a merit based system and are not even opposed in the retention election.

Neither do the legislative debates surrounding the enactment of Section 2 provide any clear and convincing support for the applicability of that provision to the election of state court judges. All of the opinions of the Fifth Circuit, including the majority, concurring and dissent, relied upon the Congressional debates to bolster their positions. *League of United Latin American Citizens Council v. Clements*, 914 F.2d 620 at 628-29 (5th Cir. 1990) (en banc) (Gee, J., majority) at 639-42 (Higginbotham, J., concurring) at 656-58 (Johnson, J., dissenting). Yet, the best that can be said about the legislative debates with respect to the applicability of Section 2 to election of state judges is that they are inconclusive. Indeed, one commentator aptly stated the following:

> Unfortunately for both proponents and opponents of permitting judicial election challenges under Section 2 of the Act, legislative history of Section 2 provides no real answers to its applicability. As noted by the *Mallory* and *Chisom* district courts, if Congress had intended

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(Continued from previous page)

judges by that method: Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming.

> to include judicial elections and amended Section 2, it left no trace of such intent in the language of that section or in the Senate Report. Although the term "representatives" is used synonymously in the Senate Report with "candidates" and "elected officials", terms that clearly refer to elected judges, the term "political subdivisions" embraces judicial elections once. Elsewhere in the history, the term "political subdivisions" is defined without the inclusion of "judicial districts."

Woollcott, *State Judicial Elections and the Voting Rights Act: Will Section 2 Protect Minority Voters?*, 23 Ga. L. Rev. 787, 797 (1988). *See also, West Virginia University Hospital, Inc. v. Casey*, 59 U.S.L.W. 4180 at 4184 (1991) (when language of a statute is unambiguous, the Court will not permit the clear meaning to be expanded or contracted by statements of individual legislators or committees during the enactment process). Thus, the Congressional debates do not provide any basis for the conclusion that Congress intended by a "clear and unequivocal expression" to apply Section 2 to the election of state judges.

The *LULAC* petitioners argue that the Voting Rights Act should be construed very broadly to remedy "all discrimination in voting." Petitioners' Brief, p. 19. In this regard, the petitioners allude to the circumstances of the enactment of Subsection (b) of Section 2. In 1980, this Court ruled in *Mobile v. Bolden*, 446 U.S. 55 (1980) that a claim under the Voting Rights Act required a finding of discriminatory intent to prove a vote dilution case. In 1982 Congress amended the Voting Rights Act in response to that decision by adding Subsection (b) of Section 2 to eliminate the intent requirement by explicitly imposing only a "results" test. From these circumstances,

the petitioners conclude "[i]t is inconceivable that Congress, while trying to strengthen Section 2, would at the same time have excluded from its reach an entire category of elections without someone saying so in the extensive legislative debates, the committee hearings, or the committee reports." Petitioners' Brief, p. 17.

Such an argument ignores the previously discussed rule of statutory construction that before Congress alters its usual constitutional balance between states and the federal governments it must make its intention to do so in unmistakably clear language in the statute. Similar arguments were raised by the petitioners in the *Will* case with respect to whether a state is a "person" within the meaning of 42 U.S.C. § 1983. While acknowledging that 42 U.S.C. § 1983 "provides a federal forum to remedy many deprivations of civil liberties," this Court in *Will* held that there was not a "clear and unequivocal expression" in either the language or the legislative history of § 1983 to indicate that states or state officials sued in their official capacity for money damages were intended to be "persons" within the meaning of that statute. *Will*, 109 S.Ct. at 2308. Likewise, before Congress reaches into such a fundamental area of state domain, such as the selection of state's judiciary, it must do so in a "clear and unequivocal manner."

The amici states do not dispute the fact that the Voting Rights Act is a constitutional method of enforcing the Fifteenth Amendment to ensure that all persons have the opportunity to vote in a free and fair manner. *See City of Rome v. United States*, 446 U.S. 156, 181 (1980). However, just as the Fifteenth Amendment was intended to protect voting rights, the Fourteenth Amendment was intended

to protect civil rights. Yet any incursion into state sovereignty vis-à-vis the enforcement of the Fourteenth Amendment through Congressional action must be "clear and unequivocal." This Court in the *Will* case held that 42 U.S.C. § 1983 was not such a "clear and unequivocal" expression of Congressional intent to intrude upon state sovereignty. Likewise, such a "clear statement" does not exist with respect to the applicability of Subsection (b) of Section 2 to the election of state court judges in multi-judge districts.

II.

TRIAL COURT JUDGES IN MULTI-JUDGE DISTRICTS ARE SINGLE MEMBER OFFICES NOT SUBJECT TO VOTE DILUTION CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

The focus of amici states in this brief is the applicability of Subsection (b) of Section 2 of the Voting Rights Act to the election of state court judges. An additional argument raised by the respondents is that trial level judges are single member offices; therefore, the election of trial level judges in multi-judge districts does not violate Section 2 of the Voting Rights Act because there can be no dilution of minority voting strength since such judges are single member offices. The amici states agree with that position as an alternative to the main argument raised by the amici states in this brief. Such arguments have been fully raised by the respondents in their brief and Judge Higginbotham in his concurring opinion in this case. *LULAC*, 914 F.2d at 634 (Higginbotham, J., concurring). Therefore, the amici states see no need to provide any additional arguments on that point.

CONCLUSION

Based upon the foregoing authorities and analysis, the amici states urge this Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit and hold that Section 2 of the Voting Rights Act does not apply to the election of state court judges.

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APPENDIX

SURVEY OF STATES WHERE JUDGES ARE ELECTED IN MULTI-JUDGE GEOGRAPHICAL AREAS*

COURT OF LAST RESORT/JUSTICES ELECTED STATEWIDE

Alabama	Minnesota	Pennsylvania
Alaska	Missouri	South Dakota
Arizona	Montana	Tennessee
Arkansas	Nebraska	Texas
Colorado	Nevada	Utah
Georgia	New Mexico	Washington
Idaho	North Carolina	West Virginia
Iowa	North Dakota	Wisconsin
Kansas	Ohio	Wyoming
Michigan	Oregon	

(29 states, 191 judgeships)

COURT OF LAST RESORT/MULTI-JUDGE ELECTION DISTRICTS

Illinois:	1 district,	2 justices
Louisiana:	1 district,	2 justices
Oklahoma:	2 districts,	7 justices
Mississippi:	3 districts,	9 justices

INTERMEDIATE APPELLATE COURT/JUDGES ELECTED STATEWIDE

Alabama	Iowa	Oregon
Alaska	Kansas	Pennsylvania
Colorado	Minnesota	Tennessee
Georgia	New Mexico	Utah
Idaho	North Carolina	

INTERMEDIATE APPELLATE COURT/MULTI-JUDGE ELECTIONS DISTRICTS

Arizona:	Both divisions	(18 judges)
Illinois:	All 5 districts	(34 judges)
Louisiana:	All 5 districts	(48 judges)
Michigan:	All 6 districts	(18 judges)

Missouri:	All 3 districts	(29 judges)
Ohio:	All 12 districts	(58 judges)
Oklahoma:	All 6 districts	(12 judges)
Texas:	All 14 districts	(80 judges)
Washington:	3 of 9 districts	(10 judges)
Wisconsin:	All 4 districts	(13 judges)

GENERAL JURISDICTION COURT/JUDGES ELECTED STATEWIDE

North Carolina (72 judges)

GENERAL JURISDICTION COURT/MULTI-JUDGE ELECTION DISTRICTS

Alabama:	31 of 39 circuits (116 judges)
Alaska:	All 4 districts (29 judges)
Arizona:	10 of 15 counties (96 judges)
Arkansas:	21 of 24 districts (57 judges)
California:	42 of 58 counties (708 judges)
Colorado:	21 of 22 districts (109 judges)
Florida:	All 20 circuits (362 judges)
Georgia:	44 of 45 circuits (134 judges)
Idaho:	All 7 districts (33 judges)
Illinois:	All 22 districts, although 5 counties, have only 1 resident judge each (775 judges)
Indiana:	51 of 93 counties (168 judges, both superior and circuit court)
Iowa:	All 14 districts (142 judges)
Kansas:	29 of 31 districts (145 judges)
Louisiana:	36 of 42 districts (183 judges)
Maryland:	15 of 24 districts (100 judges)
Michigan:	29 of 55 circuits (170 judges)
Minnesota:	All districts (224 judges)
Mississippi:	Chancery, 13 of 20 districts (32 judges); circuit, 14 of 20 districts (34 judges)
Missouri:	16 of 44 circuits (275 judges)
Montana:	9 of 20 districts (25 judges)
Nebraska:	11 of 21 districts (39 judges)
Nevada:	7 of 9 districts (33 judges)
New Mexico:	12 of 13 districts (58 judges)

New York:	Supreme, 12 of 12 districts (84 judges); county, 25 of 58 counties (80 judges)
North Dakota:	All 7 districts (26 judges)
Ohio:	81 of 88 counties (332 judges)
Oklahoma:	11 of 26 districts (56 judges), although each county has an associate district judge
Oregon:	17 of 20 districts (84 judges)
Pennsylvania:	47 of 67 counties (310 judges)
South Dakota:	All 8 circuits (37 judges)
Tennessee:	All 31 districts (128 judges)
Texas:	Unknown (although 197 of 375 judgeships are being contested in the lawsuit)
Utah:	4 of 8 districts (25 judges)
Washington:	23 of 30 districts (32 judges)
West Virginia:	23 of 30 circuits (53 judges)
Wisconsin:	41 of 72 counties (177 judges)
Wyoming:	8 of 9 districts (16 judges)

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* Knoebel, *The Voting Rights Act; Are Its Provisions Applicable to the Judiciary*, 13 State Court Journal 24 (1989).

SELECTION METHODS FOR STATE COURT JUDGES*

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
ALABAMA			
TRIAL:			
Circuit Court	Partisan election	Partisan election	Gubernatorial appt.
APPELLATE:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt.
Court of Criminal Appeals	Partisan election	Partisan election	Gubernatorial app.
Court of Civil Appeals	Partisan election	Partisan election	Gubernatorial appt.
ALASKA			
TRIAL:			
Superior Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE:			
Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
ARIZONA			
TRIAL			
Superior Court	Gubernatorial appt. from judicial nominating commission in 2 counties; partisan election in others	Retention election in 2 counties, partisan election in others	See full term
APPELLATE			
Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
ARKANSAS			
TRIAL: Circuit Court	Partisan election	Partisan election	Gubernatorial appt.
Chancery & Probate Court	Partisan election	Partisan election	Gubernatorial appt.
APPELLATE: Supreme Court	Partisan election	Partisan election	Gubernatorial appt. until 12/31 following next general election then partisan election to fill remainder term
Court of Appeals	Partisan election	Partisan election	Gubernatorial appt. until 12/31 following next general election then partisan election to fill remainder term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
CALIFORNIA			
TRIAL: Superior Court	Nonpartisan election	Retention election	Gubernatorial appt.
APPELLATE: Supreme Court	Gubernatorial appt.	Retention election	Gubernatorial appt.
Courts of Appeal	Gubernatorial appt.	Retention election	Gubernatorial appt.
COLORADO			
TRIAL: District Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
CONNECTICUT			
TRIAL: Superior Court	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating comm.)
APPELLATE: Supreme Court	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating comm.)
Appellate Court	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating comm.)

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
DELAWARE			
TRIAL: Court of Chancery	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate
Superior Court	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
DISTRICT OF COLUMBIA			
TRIAL: Superior Court	Presidential appt. from judicial nominating comm. with confirmation by Senate	Judicial nominating commission or Pres. appt. with Senate confirmation	See full term
APPELLATE: Court of Appeals	Presidential appt. from judicial nominating commission with confirmation by Senate	Judicial nominating commission or Pres. appt. with Senate confirmation	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
FLORIDA			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	Gubernatorial appt. from judicial nominating commission
District Court of Appeal	Gubernatorial appt. from judicial nominating commission	Retention election	Gubernatorial appt. from judicial nominating commission

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
GEORGIA			
TRIAL: Superior Court	Nonpartisan election	Nonpartison election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
HAWAII			
TRIAL: Circuit Ct. of Family Ct.	Gubernatorial appt. from judicial nominating commission with consent of Senate	Judicial nominating commission reappointment	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission with consent of Senate	Judicial nominating commission reappointment	See full term
Intermediate Ct. of App.	Gubernatorial appt. from judicial nominating commission with consent of Senate	Judicial nominating commission reappointment	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
IDAHO			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. may be from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. may be from judicial nominating commission
ILLINOIS			
TRIAL: Circuit Court	Partisan election	Retention election	Court selection
APPELLATE: Supreme Court	Partisan election	Retention election	Court selection
Appellate Court	Partisan election	Retention election	Court selection

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
INDIANA			
TRIAL: Superior Court	Partisan election	Retention election	Supreme Court appt. until gubernatorial appt. for remainder of term or until next general election
Circuit Court	Retention election	Partisan election	Supreme Court appt. until gubernatorial appt. for remainder of term or until next general election
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Tax Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
IOWA			
TRIAL: District Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
KANSAS			
TRIAL: District Court	Gubernatorial appt. from judicial nominating commission in 17 districts; partisan election in 14 districts	Retention election in 17 districts; partisan election in 14 districts	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
KENTUCKY			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
LOUISIANA			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Supreme Ct. selection
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Supreme Ct. selection
Courts of Appeal	Nonpartisan election	Nonpartisan election	Supreme Ct. selection
MAINE			
TRIAL: Superior Court	Gubernatorial appt.	Gubernatorial appt.	Gubernatorial appt.
APPELLATE: Supreme Judicial Court	Gubernatorial appt.	Gubernatorial appt.	Gubernatorial appt.

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
MARYLAND			
TRIAL: Circuit Court	Gubernatorial appt. from judicial nominating commission followed by partisan election	See full term	See full term
APPELLATE: Court of Appeals	Retention election	See full term	Gubernatorial appt. from judicial nominating commission with consent of Senate
Court of Special Appeals	Retention election	See full term	Gubernatorial appt. from judicial nominating commission with consent of Senate

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
MASSACHUSETTS			
TRIAL: Trial Ct. of Commonwealth	Gubernatorial appt. from judicial nominating commission with approval of Governor's Council	See full term	See full term
APPELLATE: Supreme Judicial Court	Gubernatorial appt. from judicial nominating commission with approval of Governor's Council	See full term	See full term
Appeals Court	Gubernatorial appt. from judicial nominating commission with approval of Governor's Council	See full term	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
MICHIGAN			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
APPELLATE: Supreme Court	Nonpartisan election (Partisan primary)	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
MINNESOTA			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
MISSISSIPPI			
TRIAL: Circuit Court	Partisan election	Partisan election	Gubernatorial appt. from judicial nominating comm. until next general election
Chancery Court	Partisan election	Partisan election	Gubernatorial appt. from judicial nominating comm. until next general election
APPELLATE: Supreme Court	Partisan election	Partisan election	Gubernatorial appt. from judicial nominating committee

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
MISSOURI			
TRIAL: Circuit Court	Gubernatorial appt. from judicial nominating commission in counties with nonpartisan election (5 metropolitan circuits)	Retention election for 5 metropolitan circuits, partisan election in 39 counties	Gubernatorial appt. in partisan cir. (39)
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
MONTANA			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Workers Compensation Court	Gubernatorial appt. from judicial nominating commission	Gubernatorial appt. from judicial nominating commission	Gubernatorial appt. from judicial nominating commission
Water Court	Chief Justice appt. from judicial nominating commission	Chief Justice appt. from judicial nominating commission	Chief Justice appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election (if unopposed, retention election)	Gubernatorial appt. from judicial nominating commission

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
NEBRASKA			
TRIAL: District Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
NEVADA			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
NEW HAMPSHIRE			
TRIAL: Superior Court	Gubernatorial appt. subject to approval by Executive Council	See full term	See full term
APPELLATE: Supreme Court	Gubernatorial appt. subject to approval by Executive Council	See full term	See full term
NEW JERSEY			
TRIAL: Superior Court	Gubernatorial appt. with consent of Senate	Gubernatorial appt. with consent of Senate	Gubernatorial appt. with consent of Senate
APPELLATE: Supreme Court	Gubernatorial appt. with consent of Senate	Gubernatorial appt. with consent of Senate	Gubernatorial appt. with consent of Senate
Superior Ct., App. Div.	Chief Justice appt. of Superior Court Judge	Gubernatorial reappt. with consent of Senate	Chief Justice appt. of Superior Ct. Judge

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
NEW MEXICO			
TRIAL:			
District Court	Partisan election	Partisan election	Gubernatorial appt.
APPELLATE:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt.
Court of Appeals	Partisan election	Partisan election	Gubernatorial appt.

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
NEW YORK			
TRIAL:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
County Court	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
APPELLATE:			
Court of Appeals	Gubernatorial appt. from judicial nominating commission with consent of Senate	Gubernatorial reappt.	Gubernatorial appt.
App. Divs. of Sup. Ct.	Gubernatorial appt. from list of Supreme Court justices	Gubernatorial reappt.	Gubernatorial appt.
App. Terms of Sup. Ct.	SCA appt. from lists of Supreme Court justices	SCA reappointment	SCA appt. from lists of Sup. Ct. Justices

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
NORTH CAROLINA			
TRIAL: Superior Court	Partisan election (resident judges) Gubernatorial appt. (special judges)	Partisan election	Gubernatorial appt.
APPELLATE:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt.
Court of Appeals	Partisan election	Partisan election	Gubernatorial appt.
NORTH DAKOTA			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission or election

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
OHIO			
TRIAL: Court of Common Pleas.	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
OKLAHOMA			
TRIAL: District	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Retention election	See full term	Gubernatorial appt. from judicial nominating commission
Court of Criminal Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
OREGON			
TRIAL:			
Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Tax Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
APPELLATE:			
Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
PENNSYLVANIA			
TRIAL:			
Court of Common Pleas	Partisan election	Retention election	Gubernatorial appt. from judicial nominating commission with consent of Senate
APPELLATE:			
Supreme Court	Partisan election	Retention election	Gubernatorial appt. from judicial nominating commission with consent of Senate
Superior Court	Partisan election	Retention election	Gubernatorial appt. from judicial nominating commission with consent of Senate
Commonwealth Court	Partisan election	Retention election	Gubernatorial appt. from judicial nominating commission with consent of Senate

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
RHODE ISLAND			
TRIAL: Superior Court	Gubernatorial appt. confirmed by Senate	N/A	Gubernatorial appt. confirmed by Senate
APPELLATE: Supreme Court	Legislative election	See full term	Legislative election
SOUTH CAROLINA			
TRIAL: Circuit Court	Legislative election	Legislative re-election	Legislative election
APPELLATE: Supreme Court	Legislative election	Legislative re-election	Legislative election
Court of Appeals	Legislative election	Legislative re-election	Legislative election

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
SOUTH DAKOTA			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Retention election	See full term	Gubernatorial appt. from judicial nominating commission

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
TENNESSEE			
TRIAL:			
Circuit Court	Partisan election	Partisan election	Gubernatorial appt.
Chancery Court	Partisan election	Partisan election	Gubernatorial appt.
Criminal Court	Partisan election	Partisan election	Gubernatorial appt.
APPELLATE:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt.
Court of Appeals	Retention election	See full term	Gubernatorial appt. from judicial nominating commission
Court of Criminal Appeals	Retention election	See full term	Gubernatorial appt. from judicial nominating commission

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
TEXAS			
TRIAL:			
District Courts	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
APPELLATE:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
Court of Criminal Appeals	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
Courts of Appeals	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
UTAH			
TRIAL:			
District Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Retention election	See full term
APPELLATE:			
Supreme Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
VERMONT			
TRIAL:			
Superior Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Legislative election	See full term
District Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Legislative election	See full term
APPELLATE:			
Supreme Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Legislative election	See full term
VIRGINIA			
TRIAL:			
Circuit Court	Legislative appt.	Legislative reappt.	Legislative appt.
Supreme Court	Legislative appt.	Legislative reappt.	Legislative appt.
Court of Appeals	Legislative appt.	Legislative reappt.	Legislative appt.

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
WASHINGTON			
TRIAL: Superior Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
WEST VIRGINIA			
TRIAL: Circuit Court	Partisan election	Partisan election	Gubernatorial appt.
Supreme Court of App.	Partisan election	Partisan election	Gubernatorial appt.

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
WISCONSIN			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
WYOMING			
—TRIAL:			
District Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE:			
Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

* *State Court Organization 1987*, Tables 7 and 20 (1988) (National Center for State Courts) (the original tables contain footnotes explaining exceptions to the method of selection of judges in certain states which are not included in this Appendix for simplification purposes).